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United States
Circuit Court of Appeals

For the Ninth Circuit.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA, B. Y. TAFT
and B. Y. TAFT and ARTHUR T. EARL, as
Executors of the Estate of Mary Eleanor Taft,
Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

SEP 24 1942

PAUL P. O'BRIEN,

CLERK

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Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF
ATTORNEYS:

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H. ELLIOT POWNALL, JR.

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Los Angeles, Calif.

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WM. FLEET PALMER,

United States Attorney

E. H. MITCHELL,

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EUGENE HARPOLE,

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Los Angeles, Calif.

For Appellees B. Y. Taft et al:

CARLETON W. HOLBROOK

1124 Black Bldg.

Los Angeles, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 1666 BH

UNITED STATES OF AMERICA,

Plaintiff,

v.

B. Y. TAFT, CITIZENS NATIONAL TRUST
AND SAVINGS BANK OF LOS ANGELES,
and B. Y. TAFT and ARTHUR T. EARL, as
Executors of the Estate of Mary Eleanor Taft,
deceased,

Defendants.

COMPLAINT

Now Comes the United States of America, by
Wm. Fleet Palmer, United States Attorney in and
for the Southern District of California, E. H.
Mitchell, Assistant United States Attorney for said
District, and Eugene Harpole, Special Attorney for
the Bureau of Internal Revenue, and for a cause
of action against the above-named defendants al-
leges that—

I.

At all times hereinafter mentioned the plaintiff
has been, and now, is, a corporation sovereign and
body politic.

II.

That action arises under Sections 210 and 211 of
the Revenue Act of 1926, c. 27, 44 Stat. 9; Sec-

tions 11 and 12 of the Revenue Act of 1928, c. 852, 45 Stat. 791; Section 3186 of the Revised Statutes; and Section 3207 of the Revised Statutes, as amended by Section 802 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, as [2] hereinafter more fully appears; and the same is commenced by the direction of the Attorney General of the United States at the request of the Commissioner of Internal Revenue.

III.

Defendant B. Y. Taft resides at 6315 Yucca Street, in the City of Hollywood and State of California.

IV.

Defendant Citizens National Trust and Savings Bank of Los Angeles is a banking corporation organized under the laws of the United States, with its place of business and office located in the City of Los Angeles, in the State of California.

V.

The said B. Y. Taft and defendant Arthur T. Earl are the executors of the estate of Mary Eleanor Taft now pending in probate in the Superior Court of California, in and for the County of Los Angeles.

VI.

On November 29, 1930, the Commissioner of Internal Revenue assessed a tax upon the income of defendant B. Y. Taft for the calendar year 1926, of \$864.78, and interest of \$192.24, a total assess-

ment of \$1,057.02. On that day said B. Y. Taft paid thereon the amount of \$11.52. No part of the balance of said assessment of \$1,045.50 has been paid.

VII.

On said November 29, 1930, said Commissioner assessed a tax upon the income of defendant B. Y. Taft for the calendar year 1927, [3] of \$4,175.68, and interest of \$677.72, a total assessment of \$4,853.40. No part of said amount has been paid.

VIII.

On August 25, 1931, said Commissioner assessed a tax upon the income of defendant B. Y. Taft for the calendar year 1928, of \$609.08, and interest of \$57.86, a total assessment of \$666.94. A credit of \$94.77 was allowed thereon as of the date of October 15, 1930. No part of the balance of \$572.17 has been paid.

IX.

On November 7, 1932, defendant B. Y. Taft and the plaintiff entered into an agreement in writing, which was on said day signed by said B. Y. Taft and said Commissioner, whereby it was agreed that the amounts of \$1,057.02, \$4,853.40 and \$572.17, representing said assessments of income taxes for the years 1926, 1927 and 1928, may be collected from said B. Y. Taft by distraint or by a proceeding in court begun at any time.

X.

On or before December 5, 1930, and subsequent

thereto, one Galen H. Welch was the appointed, qualified, and acting Collector of Internal Revenue in and for the United States Sixth Internal Revenue District of California.

XI.

On December 5, 1930, said Galen H. Welch, as said Collector, received the assessment lists of the assessments alleged in paragraphs VI and VII, and on August 21, 1931, he received the assessment list of the assessment alleged in paragraph VIII of this Complaint. [4]

XII.

On or about December 6, 1930, January 31, 1931, August 22, 1931, and October 9, 1931, the plaintiff gave notice to and demanded payment from said B. Y. Taft of said assessed taxes and interest alleged in paragraphs VI, VII, and VIII of this Complaint. Warrants for Distrain were issued on February 14, 1931, and December 1, 1931.

XIII.

On February 13, 1931, said Galen H. Welch, as said Collector, filed with the Clerk of the District Court of the United States for the Southern District of California a written notice of lien, wherein it was set forth that the assessment of taxes and interest on account of the income of said B. Y. Taft for the year 1926 was made in the amount of \$1,057.02, which, after demand for payment, remained unpaid, and that, by virtue of the statutes in such case made and provided, the amount of

such taxes, together with penalties, interest, and costs that may accrue in addition thereto, was a lien in favor of the United States upon all property and rights to property belonging to said B. Y. Taft.

XIV.

On February 18, 1931, a written notice of lien of like tenor and effect as that described in paragraph XIII of this Complaint was filed by said Collector in the office of the County Recorder of Los Angeles County, California.

XV.

On February 13, 1931, said Galen H. Welch, as said Collector, filed with the Clerk of the District Court of the United States for the Southern District of California a written notice of lien wherein it was set forth that the assessment of taxes and interest [5] on account of the income of said B. Y. Taft for the year 1927 was made in the amount of \$4,853.40, which, after demand for payment, remained totally unpaid, and that, by virtue of the statutes in such case made and provided, the amount of such taxes, together with penalties, interest, and costs that may accrue in addition thereto, was a lien in favor of the United States upon all the property and rights to property belonging to said B. Y. Taft.

XVI.

On February 18, 1931, a written notice of lien of like tenor and effect as that described in para-

graph XV of this Complaint was filed by said Collector in the office of the County Recorder of Los Angeles County, California.

XVII.

On December 7, 1931, said Galen H. Welch, as said Collector, filed with the Clerk of the District Court of the United States for the Southern District of California and with the County Recorder of Los Angeles County, California, a written notice of lien wherein it was set forth that the assessment of taxes and interest on account of the income of said B. Y. Taft for the year 1928 was made in the amount of \$572.17, which, after demand for payment, remained totally unpaid, and that, by virtue of the statutes in such case made and provided, the amount of such taxes, together with penalties, interest, and costs that may accrue in addition thereto, was a lien in favor of the United States upon all the property and rights to property belonging to B. Y. Taft.

XVIII.

Defendant B. Y. Taft is one of the devisees and legatees, under the will, of said estate of Mary Eleanor Taft, and is entitled to succeed to the estate of said decedent upon the closing thereof in the proportion of an undivided one-fourteenth part thereof. [6]

XIX.

The plaintiff alleges upon information and belief that defendant Citizens National Trust and Savings Bank of Los Angeles has, or claims to have,

some right, lien, title or interest in the property and things of value mentioned in paragraph XVIII of this Complaint, or in the property and things of value belonging to defendant B. Y. Taft; but the plaintiff further alleges that any such right, lien, title or interest of said Citizens National Trust and Savings Bank is junior and inferior to the lien and rights of the United States for said taxes.

Wherefore, the plaintiff prays:

1. That it do have and recover judgment against defendant B. Y. Taft for the full amount of \$6,-471.07, together with interest thereon as allowed by law.

2. That the Court, at the next term after the defendants herein have been notified of this proceeding, unless otherwise ordered by the Court, adjudicate the rights of the parties herein and finally determine the merits of all claims to, and liens upon, the property and the rights to the property and things of value of defendant B. Y. Taft, and especially the property and things of value described in paragraph XVIII of this Complaint

3. That the Court order, adjudge, and decree that the plaintiff have a first and superior lien upon the property and things of value of said B. Y. Taft, and especially the property and things of value described in paragraph XVIII of this Complaint.

4. That the amount of all property, credits, rights to, or interest in, property belonging to defendant B. Y. Taft, and determined [7] by the Court to be subject to the lien of the United States, be enforced; that the Court order a sale of such

property as the Court may determine belonging to defendant B. Y. Taft and subject to the lien of the United States; and that the proceeds of any such sale be applied to the payment of the Judgment herein prayed for; or if such property has been reduced to cash or by the nature thereof requires no sale, the Court order that same, or so much thereof as may be necessary, be applied upon the satisfaction of said Judgment.

5. That defendants B. Y. Taft and Arthur T. Earl, as executors of the estate of Mary Eleanor Taft, deceased, be required to account to this Court for all property, rights to property, credits, money and things of value in their possession or under their control, belonging to or to which the said B. Y. Taft has in any manner an interest therein.

6. That the plaintiff do have such other and further relief as to the Court may seem meet and proper in the premises.

WM. FLEET PALMER,
E.H.

United States Attorney.

E. H. MITCHELL,
E. H.

Asst. U. S. Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.
Attorneys for Plaintiff.

[Title of District Court and Cause.]

SEPARATE ANSWER OF B. Y. TAFT

Comes Now B. Y. Taft, for himself alone, and for the separate answer to Complaint of plaintiff, filed herein, states:

I.

Admits all the allegations contained in said Complaint.

Wherefore, this defendant prays that the Court adjudicate all the rights of the parties herein, and particularly of this defendant, in and to the property referred to in said Complaint; and for all proper relief.

CARLETON W. HOLBROOK,
Attorney for Defendant, B. Y.
Taft. [12]

(Duly Verified.)

[Endorsed]: Filed Aug. 16, 1941. [13]

[Title of District Court and Cause.]

SEPARATE ANSWER OF B. Y. TAFT AND
ARTHUR T. EARL, AS EXECUTORS OF
THE ESTATE OF MARY ELEANOR TAFT,
DECEASED.

Come now B. Y. Taft and Arthur T. Earl, as Executors of the Estate of Mary Eleanor Taft, deceased, and for themselves alone, and for separate

answers to the complaint of plaintiff, filed herein, state:

I.

They admit all the allegations contained in said complaint.

II.

Further answering, said executors state:

That the property and assets of the estate of Mary Eleanor Taft, deceased, which are in the possession or under the control of said executors, consist of the following:

(1) Lot 5, Block 30 of Electric Railway Homestead [14] Association, as per map recorded in Book 14, pages 27 to 28 of Miscellaneous records of Los Angeles County, California.

(2) Lot 78 of Tract 6600 as per map recorded in Book 93, pages 30 and 31 of Maps records of Los Angeles County, California.

(3) Lot One (1) of H. F. Spencer's Subdivision of the North Half (N $\frac{1}{2}$) of Block Fifty-seven (57) of Ord's Survey, in the City of Los Angeles, County of Los Angeles, State of California, except that portion taken to widen Eighth Street, as per map recorded in Book 5, page 35 of Miscellaneous Record of Los Angeles County, California. Same is subject to a lease bearing date the 4th day of November, 1912 in which Mary E. Taft, the decedent is the Lessor, for the term of fifty (50) years, beginning December 1st, 1912 and ending the 30th day of November, 1962; there remained of said

lease at the time of her death which was the 13th day of March, 1938, a period from said date down to and including November 30, 1962. Of this remaining period the lease drawn rents monthly at the rate of \$500.00 a month for the last fifteen (15) years and for the 9 years 8 months and 17 days of said lease prior to the last 15 years the monthly rental value is \$450.00 a month.

Upon said property there is a Class A. Building with five stories and a basement. By the terms of said lease during the life time of the decedent and by the provisions of the lease, upon the termination of the said lease, the building and other improvements thereupon pass to the owner of the title to the property.

(4) The sum of approximately \$6,290.30 in cash, which will be available for distribution under the orders of the Superior Court of the State of California in and for the County of Los Angeles.

Wherefore, these defendants pray that the Court [15] adjudicate all the rights of the parties herein in and to the property referred to herein, and for all proper relief.

CARLETON W. HOLBROOK,

Attorney for the Defendants.

(Duly Verified.)

[Endorsed]: Filed Aug. 16, 1941. [16]

[Title of District Court and Cause.]

ANSWER OF CITIZENS NATIONAL TRUST
& SAVINGS BANK OF LOS ANGELES,
DEFENDANT.

Comes now the Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, and appearing for itself alone, and answering the complaint on file herein, admits, denies, and alleges as follows:

I.

This defendant admits all of the allegations of Paragraphs I, II, III, IV, and V of said complaint.

II.

This defendant has not sufficient information or belief to enable it to answer and basing its denial upon that ground denies generally and specifically each and all of the allegations of Paragraph VI of said complaint, and of Paragraphs VII, VIII, and IX of said complaint. [17]

III.

This defendant admits the allegations contained in Paragraph X of said complaint.

IV.

This defendant has not sufficient information or belief to enable it to answer and basing its denial upon that ground denies generally and specifically

each and all of the allegations of Paragraphs XI, XII, and XIII of said complaint.

V.

Answering Paragraph XIV this defendant admits that notice of lien was filed by the Collector in the office of the County Recorder of Los Angeles County, California, but this defendant has not sufficient information or belief to enable it to answer whether the notice of lien was of like tenor as that described in Paragraph XIII of said complaint and basing its denial upon that ground denies that said lien was of like tenor and effect as that described in said Paragraph XIII of said complaint.

VI.

This defendant has not sufficient information or belief to enable it to answer and basing its denial upon that ground denies generally and specifically each and all of the allegations of Paragraphs XV and XVI of said complaint except that said defendant admits that on February 18, 1931, a written notice of lien was filed by said Collector in the office of the County Recorder of Los Angeles County, California.

VII.

This defendant has not sufficient information or belief to enable it to answer and basing its denial upon that ground denies generally and specifically each and all of the allegations of Paragraph XVII except this answering defendant admits that a writ-

ten notice of lien was filed with the County Recorder of Los Angeles County, California, on or about December 7, 1931. [18]

VIII.

This defendant admits the allegations of Paragraph XVIII of said complaint save and except this defendant alleges that said interest of 'B. Y. Taft is subject to an execution lien levied by this answering defendant upon the said interest of said B. Y. Taft in said estate.

IX.

Answering Paragraph XIX of said complaint, this defendant admits that it claims to have some right, lien, title, and interest in the property and things of value mentioned in Paragraph XVIII of said complaint and in the property and things of value belonging to B. Y. Taft; but denies that such right, lien, title, or interest of this defendant is junior and inferior to the lien and rights of the United States for said taxes or otherwise, and alleges the fact to be that said claim and lien of this defendant is paramount to any claim, lien, right, or title of said plaintiff.

As a Further, Separate, and Second Defense to Said Complaint, This Defendant Alleges:

I.

This answering defendant alleges that the claims of the United States of America, plaintiff, for in-

come tax as set forth and alleged in its complaint on file herein, are barred by the provisions of the Internal Revenue Code, U.S.C.A., Title 26, Section 275 (a) and Section 276 (c).

As a Further, Separate, and Third Defense to Said Complaint, This Defendant Alleges:

I.

That the claims of the plaintiff as set forth in its complaint on file herein are subject and subordinate to the claim of this answering defendant by virtue of a levy of execution against all of the interest of B. Y. Taft in and to the Estate of Mary Eleanor Taft, deceased, arising out of an action on file in the Superior Court [19] of the State of California, in and for the County of Los Angeles, No. 423931, entitled "Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, Plaintiff, vs., David E. Fulwider, R. Clifford Gordon, W. W. Stamm, and B. Y. Taft, Defendants," said levy of execution on the part of this defendant having been made prior to the distraint proceedings instituted by the plaintiff herein, the United States of America.

Wherefore this defendant prays that the plaintiff take nothing by this complaint and that it be determined by the Court that the rights of this defendant are paramount and superior to the rights of the plaintiff herein, and for such other and fur-

ther relief as the Court may deem just and equitable.

PAUL J. OTTO,

Attorney for Defendant, Citizens National Trust & Savings Bank of Los Angeles.

[20]

(Duly Verified.)

[Endorsed]: Filed Oct. 24, 1941. [21]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the plaintiff herein and the defendant Citizens National Trust & Savings Bank of Los Angeles, through their respective counsel, that in so far as the controversy existing between said parties in the above entitled proceeding is concerned the following facts are true:

I.

That all of the allegations of fact contained in Paragraphs I. to XVIII. inclusive of the complaint on file herein shall be deemed true and correct.

II.

That Mary Eleanor Taft died on or about March 13, 1938, a resident of the County of Los Angeles, State of California, and that at the time of her

death she left an estate now being probated in [22] the Superior Court of the State of California, in and for the County of Los Angeles, and that by her Will said Mary Eleanor Taft left B. Y. Taft an undivided one-fourteenth ($1/14$) interest in her said estate.

III.

That on or about the 9th day of March, 1938, the defendant Citizens National Trust & Savings Bank of Los Angeles, in an action filed in the Superior Court of the State of California, in and for the County of Los Angeles, obtained a judgment against B. Y. Taft in the amount of \$17,829 plus interest as provided by law, and that thereafter and on or about the 9th day of April, 1938, said Citizens National Trust & Savings Bank of Los Angeles levied a writ of execution on all of the right, title, and interest of the said B. Y. Taft in and to the Estate of Mary Eleanor Taft, deceased, a notice of levy and copy of execution being filed with the Clerk in said probate proceedings on April 9, 1938.

IV.

That thereafter and on or about the 20th day of September, 1940, the United States Collector of Internal Revenue for the Sixth Collection District of California levied a warrant of distraint upon said property and rights to property of said B. Y. Taft in the possession of the Executors of the Estate of Mary Eleanor Taft, deceased, by making

demand upon said Executors for the immediate surrender of such property, rights to property, money, or credits as were determined by the Court to be properly distributable to said B. Y. Taft; that said notice and demand served upon the Executors as aforesaid was the only notice and demand of the plaintiff herein to the right, title, and interest of said B. Y. Taft in and to the estate of said Mary Eleanor Taft, deceased, other than the said liens recorded as alleged in plaintiff's complaint.

Dated this 5th day of December, 1941. [23]

WM. FLEET PALMER,
United States Attorney,

E. H. MITCHELL,
Asst. U. S. Attorney, &

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue

SAMUEL TAYLOR
Special Attorney, Bureau of
Internal Revenue

By EUGENE HARPOLE
Attorneys for Plaintiff

PAUL J. OTTO
Attorney for Defendant Citi-
zens National Trust & Sav-
ings Bank of Los Angeles.

It Is Further Stipulated that the Citizens Na-
tional Trust & Savings had no actual knowledge or

notice of the liens and claims of the plaintiff, other than the notice arising from recordations of the tax liens referred to in plaintiff's complaint.

E. H. by S. T.

PAUL J. OTTO

By H. ELLIOT POWNALL, Jr.

[Endorsed]: Filed Dec. 10, 1941. [24]

[Title of District Court and Cause.]

OPINION

Appearances:

William Fleet Palmer

United States Attorney

E. H. Mitchell

Assistant United States Attorney

Eugene Harpole

Special Attorney, Bureau of Internal Revenue
Attorneys for the Plaintiff,

Carleton W. Holbrook,

Attorney for Defendant B. Y. Taft and
Arthur T. Earl as Executors of the Es-
tate of Mary Eleanor Taft, Deceased,

Paul J. Otto and

H. Elliott Pownall,

Attorneys for Defendant, Citizens Na-
tional Trust & Savings Bank of Los An-
geles.

This action involves the determination of the priority between a tax lien created under the provisions of Sections 3670 and 3671 of the Revenue Code, and a lien created by the levy of an execution by the Citizens National Trust & Savings Bank of Los Angeles. The sole question involved is whether or not the lien created by said sections attaches to after-acquired property. The case was submitted on a written stipulation [27] of facts.

The facts, in so far as they are pertinent to this case, disclose that during the year 1931, the Government perfected its lien in the sum of \$6,471.07, and interest upon all property and rights to property belonging to the defendant B. Y. Taft.

Paragraph IX of the complaint alleges that:

“On November 7, 1932, defendant B. Y. Taft and the plaintiff entered into an agreement in writing, which was on said day signed by B. Y. Taft and said Commissioner, whereby it was agreed that the amounts of \$1,057.02, \$4,853.40 and \$572.17, representing said assessments of income taxes for the years 1926, 1927 and 1928, may be collected from said B. Y. Taft by distraint or by a proceeding in court begun at any time.”

The stipulation of facts admits this allegation. The court raised the question relative to the sufficiency of this allegation as a sufficient pleading alleging the waiver of the statute of limitations. The defendant, Citizens National Trust & Savings Bank of Los Angeles, in its supplemental brief stated:

“Further, the defendant bank is not raising any question as to the effect of the waiver executed by the defendant B. Y. Taft, it being conceded that a waiver was signed by said Taft on November 7, 1932. The particular point upon which defendant bank relies in the instant action is that the lien of the Government did not attach to the property of the judgment debtor, which is here in controversy, and that the only basis upon which the Government is entitled to claim is upon the basis of the distraint proceedings, which it is stipulated were not run until September, 1940, approximately two years subsequent to the date [28] on which the claim of the defendant bank attaches to the property.”

The court has accepted statement of counsel and the issue of the statute of limitations is thereby waived as an issue in this case.

On March 13, 1938, Mary Eleanor Taft died and under the terms of her last will and testament, the defendant B. Y. Taft, was bequeathed an undivided 1/14th interest therein. The said estate is being probated in the County of Los Angeles and the estate is located in said County.

On April 9, 1938, the Citizens National Trust & Savings Bank of Los Angeles, levied a writ of execution on all the right, title and interest of said B. Y. Taft in the estate of said deceased on a judgment procured on March 9, 1938, for the sum of \$17,829.00 and interest. Thereafter, on September 20, 1940, the Collector levied a warrant of distraint upon said property.

Said Sections 3670 and 3671 read as follows:

“Section 3670. Property Subject to Lien

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.”

“Section 3671. Period of Lien

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or become unenforceable by reason of lapse of time. 53 Stat. 449.” [29]

Since the original adoption of Section 3186 Revised Statutes of the United States, only two reported court cases are found attempting to pass upon the question herein involved.

The first case is *United States v. Pacific Railroad et al*, reported in 1 Fed. 97. The court in this case was considering the point as to whether or not the lien attached to property which had been conveyed to innocent purchasers prior to any demand and was not considering after-acquired property. The court therein stated:

“* * * Let us examine the phraseology: ‘If any person, * * * liable to pay a tax, shall

neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, * * * upon all property, etc., belonging* to such person,' etc. The statute doe not say 'upon all property which may have belonged to such person when the tax accrued.'

This or similar language would, I think, have been employed if Congress had intended to give the statute this effect. It must be conceded that the words 'all property * * * belonging to such person' must be construed as referring to some time to be ascertained by the context; and it may also be conceded that we might, without doing violence to the language of the law, refer them to the time when the tax became due, and make the clause read 'all property, etc., belonging to such person, etc., at the time the tax became due.' This, however, does violence to the spirit of the act for reasons already stated. Another reading is authorized by the language, and is in harmony with the spirit, and that is the one I have adopted, namely, that the words in question refer [30] to the time when the demand is made, and may be phrased thus: 'All property, etc., belonging to such person at the time such

*Emphasis by the court.

demand is made.' By this construction the lien, when it once attaches, relates back to the time when the tax was due, but it does not attach to the property transferred to innocent purchasers prior to demand. This view also harmonizes with the general policy of the law relating to land titles, which is to protect the citizen against loss from secret liens, not disclosed by any public record nor ascertainable by due diligence. Nor is it unjust toward the government, for it is fair to presume that the government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable time, make demand, or take some steps in the direction of making collections, in all cases where there is delinquency. The government may protect itself by diligence if the view I take of the statute shall prevail; but, if the opposite view is sustained, the citizen who purchases real estate is absolutely without protection against possible liens for taxes of this character."

It will be noted that the court there was construing the lien statute as originally enacted and before any amendment thereto had been made. I am of the opinion that this decision is not entitled to great weight for the reason that in so far as the same applies to after-acquired property, it is mere dictum and for the further reason that the statute

under consideration has been amended in a material respect.

The law as originally enacted provided "the amount shall be a lien in favor of the United States from the time it was due until paid" [31] while under the present state of the law, it is specifically provided that the lien "shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time".

After the lapse of sixty years, in the case of *United States v. Long Island Drug Co., Inc., et al.*, 115 F. (2d) 983 (2d Cir.) involving the question of whether the drug company had in its possession any personal property belonging to the debtor taxpayer, the court stated:

"* * * Rights which do not exist at the time of the demand upon the taxpayer are not subjected to any lien. *United States v. Pacific R. R., C. C. Mo.*, 1 Fed. 97. Here there was no showing that the taxpayer had any claim against the Drug Company when the demand upon him for payment was made."

And the court further stated:

"In the absence of a statute to the contrary, it is the usual rule that a garnishment does not affect future earnings or salary. *Savings Bank of Danbury v. Loewe*, 242 U. S. 357, 37 S. Ct. 172, 61 L. Ed. 360. Moreover, there would seem to be no justice in depriving the garnishee of its right to set off which, so far as the record shows was acquired for a valuable consideration before the demand was made on the Drug

Company by the Collector. Both on April 15, 1936, when payment was first demanded of the Drug Company, and on March 7, 1939, when the last demand was made, the latter owed no debt to Steinberg upon which distraint could be made. We find nothing in Section 3690 or Section 3710 which varies the general rule that a garnishee process is not to be extended to future earnings, but will only reach an indebtedness which has accrued. [32]

It appears from the foregoing that there was no lien upon any earnings of Steinberg on April 15, 1936, or accruing thereafter, and that he had no accrued earnings upon the dates upon which a levy was attempted. Accordingly the Long Island Drug Company, Inc., had no property which it could be required to surrender by reason of the provision of 26 USCA Internal Revenue Code, §3710."

From the foregoing it will be observed that the real issue before the court did not involve after-acquired property. The court having determined the drug company had no property in its possession at the time of the levy, naturally, the Government's case fell. This case must be considered as an approval of the case of *United States v. Pacific R. R.*, *supra*, but the opinion discloses that the court failed to consider that the reason on which this decision is predicated ceased to exist when Section 3186 of the Rev. Stat. was amended so as to require the recording of notice to render the lien valid as against innocent purchasers.

To the contrary, the Board of Tax Appeals in the case of *A. H. Graves et al v. Commissioner*, 12 B.T.A. 124, in discussing Section 3186 of the Revised Statutes in part said:

“We do not consider it necessary unduly to enlarge this opinion by an extended consideration of questions relative to the time the lien arises; the time it attaches; or to what property it attaches, except to state that the lien arises only if here has been an assessment plus notice and demand. It relates back from the time of notice and demand to the time when the assessment list was received by the collector, and it attaches upon such property as the taxpayer has at the time the lien arises, that is, at the time of notice and demand, *United [33] States v. Pacific R. R.*, 1 F. 97, and, of course, to all the property that the tax debtor subsequently acquires.” (Underscoring supplied)

It will be noted from the above quotation that the case of *United States v. Pacific R. R.*, *supra*, is approved in so far as it held that the lien attaches to the property of the taxpayer held at the time the lien arises but specifically repudiates by way of dictum said decision, in so far as it applies to after-acquired property.

One published General Counsel Memorandum is found in C. B. VII-2, page 94, involving the interpretation of Section 613(c) of the Revenue Act of 1928. In this memorandum the following language is used:

“Assuming the fact of the foreclosed prior

mortgage and all other facts to be as stated, it is the opinion of this office that the above-quoted section of the law does not mean that the Government's lien against *th* property of a taxpayer should be released before the six-year period governing collection has expired, for the reason that it is altogether probable that a delinquent taxpayer may at any time prior to the expiration of the statutory period of limitation become possessed of property against which the lien may attach, thus making the tax liability enforceable through the lien. * * *” (Underscoring supplied)

It will thus be seen that the Board of Tax Appeals and the Departmental interpretation are in conflict with the two cases above cited.

In the case of *Minnesota Mutual Life Insurance Co. et al. v. United States*, 47 F. (2d) 942 (N. D. Texas), I find the following language used:

“The decree will not extinguish the lien against anything else that the debtor may acquire, nor does it extinguish the debt. It merely removes the cloud from [34] the particular real estate described in this suit because the value thereof is very much less than the prior lien owned by the plaintiffs, and there is and would be no equity for the junior lienholder, to wit, the United States.” (Underscoring supplied)

It has been held that the Federal Tax lien has the effect of a judgment (*Bull v. U. S.* 295 U. S. 247) and it would appear that a federal tax lien is somewhat analogous to a judgment lien, and it might not be going too far astray to examine some

of the authorities that deal with this subject, in so far as the same applies to after-acquired property. It is true that most of the states specifically provide by statute that the judgment lien shall apply to after-acquired property, consequently, only cases that construe statutes that do not specifically so provide should be considered.

Generally speaking, a majority of the courts hold that a judgment is a lien on after acquired property (15 R. C. L. 802), but a contrary rule has been adopted in some jurisdictions (34 C. J. p. 590).

Pennsylvania appears to be the first state to hold that a judgment does not affect after acquired property (*Colhoun v. Snider*, 6 Binn. 135). In a later decision in *Water's Appeal*, 35 Penn. St. 523, 78 Am. Dec. 354, the court stated:

“Notwithstanding the dissatisfaction that has been expressed with the doctrine of *Colhoun v. Snider*, supra, by several judges, it has been followed in a multitude of cases, and it is too firmly rooted in our law to be shaken at this day.”

It will thus be noted that the Pennsylvania courts clung to their former holdings under the rule of *stare decisis*.

The Ohio courts followed the Pennsylvania holdings (*Roads v. Symmes*, 1 Ohio 281; 13 Am. Dec. 621). But the courts of Ohio were not any too happy in this holding as reflected in *Stiles, ex. Dem. Miller & McDonald v. Murphy*, 4 Ohio, p. 92. The court stated at page 98: [35]

“* * * When a rule of construction has been adopted, upon which titles to real estate depend, it would lead to great inconvenience, if not injustice, to alter it. That decision may have been an innovation upon established principles of law—it may have been a departure from true policy, under the circumstances in which we are placed—but it would be a more dangerous innovation, and a wider departure from true policy now to disturb it. 2 Cran. 22; 1 Ohio, 1.”

But a majority of the state courts have refused to follow the rule as reflected by the decisions in Pennsylvania and Ohio. (See *Steele v. Taylor*, 1 Minn. 210-215; *Elisha S. Babock v. John Jones*, 15 Kans. 229; *Lewis Ralston etc. v. John D. Field*, 32 Ga. 453; *Bank v. Watson & Hubbard*, 13 Ark., 74-85; *Atlas Portland Cement Co., et al. v. Fox*, 265 Fed. 444-446; *Freeman on Judgments*, 5th Ed. §955, page 2007.

Coad v. Cowhick et al., 63 Pac. 584, is an exceptionally well reasoned case wherein the court said:

“At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. But by St. Westm. II (13 Edw. I), c. 18, the judgment creditor was given his election to sue out a writ of *fi. fa.* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant, except oxen

and beasts of the plow, and a moiety of his lands, until the debt should be levied by a reasonable price and extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an "elegit". *Hutcheson v. Grubbs*, 80 Va. 254. While this statute did not in direct terms create the lien, courts so [36] construed it as to infer a lien from the power to take the lands in execution. *Scriba v. Deane*, 1 Brock, 170 Fed. Cas. No. 12,559. And this lien has been held by the English courts and by the almost unanimous opinion of the courts of this country to extend to the after-acquired lands of the debtor. Most of the states have enacted statutes declaring the lien, and, almost without exception, and without regard to whether such statute in terms extended the lien to after-acquired lands, they have held that such lands were bound by the judgment from the time of their acquisition by the debtor. *Freeman on Judgments* 367. So far as I can find, the only two exceptions are Pennsylvania and Ohio. There was also a similar holding in Iowa. *Harrington v. Sharp*, 1. G. Greene, 131. But the rule laid down in that case was subsequently changed by an amendment to the statute expressly providing that judgments should be a lien upon after-acquired lands, thus bringing it into line with the mass of opinion in this country. *Ware v. Delahaye*, 95 Iowa, 682, 64 N. W. 640. The Mississippi court is also cited as adopting the same construction. But an ex-

amination of the cases shows that that court simply rejected the contention that lands subsequently acquired were bound from the date of the judgment, and held that 'the lien attached on after-acquired property from the time it was acquired by the debtor.' *Moody v. Harper* 25 Miss. 492; *Cayce v. Stovall*, 50 Miss. 402."

Nebraska courts in *Filley & Hopkins v. Duncan*, 1 Neb. 134, first followed the Pennsylvania rule but later in *Colt v. DuBois*, 7 Neb. 391, [37] the court at page 396 stated:

"It is undoubtedly true, that where a rule of construction, upon which titles to real estate depend, has been adopted, it may lead to great inconveniences, if not injustice, to change it. But as the question presented by this case has never before been submitted to this court, we deem it best to disregard the dictum in the case of *Filley v. Duncan*, and lay down what we deem to be the correct rule, subjecting land acquired subsequently to the rendition of a judgment to its payment. The judgment of the district court is affirmed."

From the foregoing it must be conceded that the great weight of authority is in favor of the view, that judgments, are liens upon after-acquired property, notwithstanding the statutes do not specifically so provide. Many of the statutes considered in such cases are less specific than Sections 3670 and 3671 of the Revenue Code.

I am of the opinion that the majority rule should be applied in construing said Section 3670 and so applying it, I have concluded that the lien so created applies to after-acquired property.

I am of the further opinion that said Sections 3670 and 3671 create a lien on after-acquired property for the following additional reasons:

1. The departmental interpretation of these sections is entitled to great weight and should not be disregarded without the most cogent and persuasive reasons. (*Baltzell v. Mitchell*, 3 Fed. (2d) 428 and cases therein cited; *Maryland Casualty Co. v. U. S.*, 251 U. S. 342.)

2. Section 3670 subjects "all property and rights to property" to the lien. Section 3671 provides when the lien arises and "shall continue until the liability for such an amount is satisfied or becomes unenforceable by reason of lapse of time". Under the reasoning of defendant Citizens National Trust & Savings Bank of Los Angeles, if the [38] debtor taxpayer owned no property at the time of the creation of the lien, it would cease to exist and said section 3671 would be meaningless and the provision for the continuance of the lien would be surplusage. To so hold would in effect nullify said section 3671, and violate well recognized rules on statutory construction. (*Armstrong Co. v. Nu-Enamel Corp.*, 305 U. S. 315.)

I therefore hold that such a tax lien does not depend upon the existence of property belonging to the judgment debtor for its sustenance and continued life. The lien created by said section 3670

continues as provided in section 3671 and attaches to after-acquired property.

I find added support to my conclusions in the construction of section 3679 of the Revenue Code which provides for a means of clearing title to realty affected by liens created under said section 3670. In *Oden v. United States*, 33 Fed. (2d) 553; *U. S. v. Snyder*, 149 U. S. 210; *Minnesota Mutual Life Insurance Co. et al. v. United States*, 47 F. (2d) 942, and *Sherwood v. United States*, 5 Fed. (2d) 991, it has been held that a decree freeing certain property from the lien does not extinguish the lien. If such is true, what is the purpose of the continuance of the lien unless it is continued in existence for the purpose of affixing itself to after-acquired property.

The lien herein involved stands of record and in no manner whatsoever affects the rights of innocent third parties. It is inconceivable that Congress in any manner, under said sections 3670 and 3671, intended to weaken the Government by staying the hand of the Collector so that he could not reach after-acquired property.

Judgment for plaintiff. Counsel for plaintiff is directed to submit expeditiously proposed findings and decree in accordance with this opinion.

Dated: Los Angeles, California, April 4th, 1942.

BEN HARRISON

Judge

[Endorsed]: Filed Apr. 4, 1942. [39]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case was submitted to the Court upon a written Stipulation of Facts on December 9, 1941. The submission was subsequently vacated and the matter thereafter resubmitted to the Court on Briefs. The Court, after considering the evidence, makes the following Findings of Fact:

I.

That all of the allegations of fact contained in Paragraphs I to XVIII, inclusive, of the Complaint on file herein are true and correct. [40]

II.

That Mary Eleanor Taft died on or about March 13, 1938, a resident of the County of Los Angeles, State of California, and that at the time of her death she left an estate now being probated in the Superior Court of the State of California, in and for the County of Los Angeles, and that by her Will said Mary Eleanor Taft left B. Y. Taft an undivided one-fourteenth interest in her said estate.

III.

That on or about the 9th day of March, 1938, the defendant, Citizens National Trust & Savings Bank of Los Angeles, in an action filed in the Superior Court of the State of California, in and

for the County of Los Angeles, obtained a judgment against B. Y. Taft in the amount of \$17,829.00 plus interest as provided by law, and that thereafter and on or about the 9th day of April, 1938, said Citizens National Trust & Savings Bank of Los Angeles levied a writ of execution on all of the right, title and interest of the said B. Y. Taft in and to the Estate of Mary Eleanor Taft, deceased, a notice of levy and copy of execution being filed with the Clerk in said probate proceedings on April 9, 1938.

IV.

That thereafter and on or about the 20th day of September, 1940, the United States Collector of Internal Revenue for the Sixth Collection District of California levied a warrant of distraint upon said property and rights to property of said B. Y. Taft in the possession of the Executors of the Estate of Mary Eleanor Taft, deceased, by making demand upon said Executors for the immediate surrender of such property, rights to property, money, or credits as were determined by the Court to be properly distributable to said B. Y. Taft; that said notice and demand served upon the Executors as aforesaid was the only notice and demand of the plaintiff herein to the right, title and interest of said B. Y. Taft in and to the [41] Estate of said Mary Eleanor Taft, deceased, other than the said liens recorded as alleged in plaintiff's Complaint.

V.

That the defendant, Citizens National Trust & Savings Bank of Los Angeles, had no actual knowledge or notice of the liens and claims of the plaintiff other than the notice arising from recordation of the tax liens referred to in plaintiff's Complaint.

VI.

That the defendant, Citizens National Trust & Savings Bank of Los Angeles, raises no question as to the effect of the waiver of the statute of limitations, which it is acknowledged the defendant, B. Y. Taft, signed on November 7, 1932.

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

I.

That by virtue of the provisions of Section 3186(a) of the Revised Statutes of the United States (Section 3670 of the Internal Revenue Code) the United States acquired a lien upon all property and rights to property belonging to the defendant, B. Y. Taft, as of the dates the Collector of Internal Revenue at Los Angeles, California, received the assessment lists covering the Federal income taxes of said B. Y. Taft for the years 1926, 1927 and 1928; to-wit, on December 5, 1930 with respect to the taxes for 1926 and 1927 and on August 21, 1931, with respect to the taxes for 1928.

II.

That under the provisions of Section 3186(a)

of the Revised Statutes of the United States (Section 3671 of the Internal Revenue Code) said tax liens have continued from the 5th day of December, 1930, and the 21st day of August, 1931, respectively, to the present [42] time, and are still in force, by reason of the taxpayer said B. Y. Taft having waived all statutes of limitation which might have applied to the collection of said 1926, 1927 and 1928 income taxes.

III.

That said tax liens attach to all property and rights to property acquired by the taxpayer, B. Y. Taft, including an undivided one-fourteenth interest given him by will in the estate of Mary Eleanor Taft, deceased, subsequent to December 5, 1930, and August 21, 1931, the dates upon which said tax liens arose.

IV.

That notices of said tax liens were recorded in the manner provided by Section 3186(b) of the Revised Statutes of the United States, now Section 3672 of the Internal Revenue Code, on the 13th and 18th days of February, 1931, with respect to the income taxes assessed against the defendant, B. Y. Taft, for the years 1926 and 1927 and on December 7, 1931, with respect to the taxes for 1928 and said liens have been at all times since, and now are, good, valid and effective as against all persons.

V.

That the defendant, Citizens National Trust & Savings Bank of Los Angeles, acquired a lien upon B. Y. Taft's said one-fourteenth interest in the estate of Mary Eleanor Taft, deceased, on the 9th day of April, 1938, by virtue of the levy of a writ of execution on the said interest of B. Y. Taft in the estate of Mary Eleanor Taft, deceased, but that said lien of the Citizens National Trust & Savings Bank of Los Angeles is junior, subordinate and inferior to the liens of the United States for the 1926, 1927 and 1928 income taxes of said B. Y. Taft.

VI.

That the liens of the United States for the 1926, 1927 and 1928 income taxes of said B. Y. Taft are superior and paramount to the [43] rights of any and all of the defendants herein in or to the one-fourteenth interest of said B. Y. Taft in the estate of Mary Eleanor Taft, deceased.

VII.

That the defendant, B. Y. Taft, is indebted to the plaintiff, United States of America, in the sum of \$6,471.07, together with interest thereon as allowed by law, on account of income taxes assessed against him for the years 1926, 1927 and 1928.

VIII.

That the plaintiff, United States of America, is entitled to an Order for the sale of said B. Y.

Taft's undivided one-fourteenth interest in and to the estate of Mary Eleanor Taft, deceased, under the said liens of the United States, and that the proceeds of said sale be applied upon said taxes; or that if said one-fourteenth interest has been reduced to cash, same be surrendered by the defendant, B. Y. Taft and Arthur T. Earl, as executors of the estate of Mary Eleanor Taft, to the United States of America or its Collector of Internal Revenue to be applied toward the satisfaction of said income taxes.

Dated: This 20 day of April, 1942.

BEN HARRISON

United States District Judge.

Approved As To Form:

PAUL J. OTTO and

H. ELLIOTT POWNALL

By

Attorneys for Defendant, Citizens National Trust & Savings Bank of Los Angeles.

CARLETON W. HOLBROOK

Attorney for Defendant, B. Y. Taft and Arthur T. Earl as Executors of the Estate of Mary Eleanor Taft, Deceased.

[Endorsed]: Filed Apr. 20, 1942. [44]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 1666-BH Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. Y. TAFT, CITIZENS NATIONAL TRUST
AND SAVINGS BANK OF LOS ANGELES,
and B. Y. TAFT and ARTHUR T. EARL, as
Executors of the Estate of MARY ELEANOR
TAFT, Deceased,

Defendants.

DECREE

The above entitled case was submitted to the Court upon a written Stipulation of Facts on December 9, 1941. The plaintiff, United States of America, appeared by its attorneys, William Fleet Palmer, United States Attorney for the Southern District of California, E. H. Mitchell, Asst. United States Attorney for said District, and Eugene Harpole and Samuel Taylor, Special Attorneys for the Bureau of Internal Revenue; Defendants, B. Y. Taft and Arthur T. Earl, as Executors of the Estate of Mary Eleanor Taft, Deceased, and B. Y. Taft, by their attorney, Carleton W. Holbrook, and Defendant, Citizens National Trust and Savings Bank of Los Angeles, by its at- [45] torneys, Paul J. Otto and H. Elliott Pownall; the Court

having made its Findings of Fact and entered its Conclusions of Law, herein decrees as follows:

I.

That the defendant, B. Y. Taft, is indebted to the plaintiff, United States of America, on account of 1926, 1927 and 1928 income taxes, in the sum of \$6,471.07, together with interest thereon as allowed by law.

II.

That the United States of America possesses a lien upon all property and rights to property of B. Y. Taft, including his undivided one-fourteenth interest in the estate of Mary Eleanor Taft, Deceased, on account of 1926, 1927 and 1928 income taxes, which lien is paramount and superior to the liens, claims and rights of all or any of the parties defendant.

III.

That the said undivided one-fourteenth interest of the defendant, B. Y. Taft, in the estate of Mary Eleanor Taft, Deceased, be sold by the United States Marshal and that the proceeds of such sale be applied, (1) toward the cost of sale and the balance remaining applied to the satisfaction of said income taxes; or that if such property has been reduced to cash, then the defendants, B. Y. Taft and Arthur T. Earl, as Executors of the

Estate of Mary Eleanor Taft, Deceased, account for and pay into this Court all of said cash, to be applied, (1) to the cost of this action and (2) toward the satisfaction of said income tax liability of B. Y. Taft for the years 1926, 1927 and 1928.

IV.

That the surplus, if any, remaining after the satisfaction of said taxes be paid to the defendant, Citizens National Trust and [46] Savings Bank of Los Angeles, to apply toward the satisfaction of its judgment.

V.

The remainder, if any, to be paid to the defendant, B. Y. Taft.

VI.

That the plaintiff, United States of America, do have and recover from the defendants herein its costs, to be taxed by the Clerk of this Court.

Dated: This 20 day of April, 1942.

BEN HARRISON

United States District Judge.

Approved As To Form:

PAUL J. OTTO and

H. ELLIOTT POWNALL

By

Attorneys for Defendant, Cit-
izens National Trust and
Savings Bank of Los An-
geles.

CARLETON W. HOLBROOK

Attorney for Defendant, B.
Y. Taft and Arthur T. Earl
as Executors of the Estate
of Mary Eleanor Taft, De-
ceased, and B. Y. Taft.

[Endorsed]: Filed and entered Apr. 20, 1942.

[47]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that the Citizens Na-
tional Trust & Savings Bank of Los Angeles, one
of the defendants in the above entitled action,
hereby appeals to the Circuit Court of Appeals

for the Ninth Circuit from the Judgment entered in this action on the 20th day of April, 1942.

Dated this 13th day of July, 1942.

PAUL J. OTTO

H. ELLIOT POWNALL, JR.

Attorneys for Appellant, Citizens National Trust & Savings Bank of Los Angeles.
453 S. Spring St., Room
1042, Los Angeles, California. TUCKER 3694.

[Endorsed]: Filed and Mld. Copies to Attys for Appellees Jul 16, 1942. [49]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 56, inclusive, contain full, true and correct copies of Complaint; Summons and Return of Marshal thereon; Separate Answer of B. Y. Taft; Separate Answer of B. Y. Tart and Arthur T. Earl as Executors of the Estate of Mary Eleanor Taft, deceased; Answer of Citizens National Trust & Savings Bank of Los Angeles, Defendant; Stipulation of Facts; Minute

Order of December 10, 1941; Minute Order of April 4, 1942; Opinion; Findings of Fact and Conclusions of Law; Decree; Notice by Clerk of Entry of Judgment; Notice of Appeal; Cost Bond on Appeal; and Stipulation Designating the Record, Proceedings and Evidence to be included in Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$9.80 which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 25 day of August, 1942.

[Seal]

EDMUND L. SMITH,
Clerk

By THEODORE HOCKE
Deputy Clerk

[Endorsed]: No. 10232. United States Circuit Court of Appeals for the Ninth Circuit. Citizens National Trust & Savings Bank of Los Angeles, Appellant, vs. United States of America, B. Y. Taft and B. Y. Taft and Arthur T. Earl, as Executors of the Estate of Mary Eleanor Taft, Deceased, Appellees. Transcript of Record. Upon Appeal from

the District Court of the United States for the Southern District of California, Central Division.

Filed August 26, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff and Respondent,

vs.

B. Y. TAFT, and B. Y. TAFT and ARTHUR T.
EARL, as Executors of the Estate of Mary
Eleanor Taft, deceased,

Defendants,

and

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES,

Defendant and Appellant.

STATEMENT OF POINTS AND DESIGNA-
TION OF PRINTED RECORD

(Subdivision 6 of Rule 19, C.C.A. 9)

STATEMENT OF POINTS

Under the provisions of the statutes of the United States creating a lien in favor of the government

for taxes and providing for the enforcement of a tax claim by distraint proceedings, the lien created under the provisions of Section 3186(a) of the Revised Statutes of the United States (Section 3670 of U.S.C.A., Title 26), does not attach to after acquired property of a tax debtor and the right of the government in and to after acquired property of a tax debtor does not arise until such property has been distrained upon by the government. It was therefore error for the District Court to hold and decree in the instant case that the United States had a lien for income taxes superior to, and was entitled to payment from after acquired assets of the tax debtor prior to, the lien of and the payment of the claim of appellant bank, where appellant bank had secured an attachment lien on said after acquired property more than a year prior to the government's asserting a claim by distraint proceedings on said property.

DESIGNATION OF PRINTED RECORD

The portions of the original certified record which appellant believes to be necessary for the consideration of the foregoing point and therefore designates as the part to be included in the printed record, are as follows:

1. The complaint as set forth commencing on page 2 of the original certified record.
2. Answer of Citizens National Trust & Savings Bank of Los Angeles, set forth commencing on page 17 of the original certified record.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS
OF RECORD FOR PRINTING

The Appellee believes the following portions of the certified record to be necessary for consideration of the points upon which appellant relies:

1. Opinion of the District Court, commencing on page 27 of the certified record.

WM. FLEET PALMER,
United States Attorney

E. H. MITCHELL,
Asst. U. S. Attorney,

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,
Attorneys for United States of
America.

[Endorsed]: Filed Aug. 28, 1942.

No. 10232

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA, B. Y. TAFT, and B. Y. TAFT
and ARTHUR T. EARL, as Executors of the Estate of
Mary Eleanor Taft, Deceased,

Appellees.

APPELLANT'S OPENING BRIEF.

PAUL J. OTTO,
1042 Citizens National Bank Building, Los Angeles,

H. ELLIOT POWNALL, JR.,
633 Citizens National Bank Building, Los Angeles,

Attorneys for Defendant and Appellant.

FILED

OCT 28 1942

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No. 10232

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA, B. Y. TAFT, and B. Y. TAFT
and ARTHUR T. EARL, as Executors of the Estate of
Mary Eleanor Taft, Deceased,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts as to Jurisdiction.

As shown by the complaint filed in the District Court of the United States, in and for the Southern District of California, Central Division, by the plaintiff, United States of America, this action arises under Sections 210 and 211 of the Revenue Act of 1926, c. 27, 44 Stat. 9; Sections 11 and 12 of the Revenue Act of 1928, c. 852, 45 Stat. 791; Section 3186 of the Revised Statutes; and Section 802 of the Revenue Act of 1936, c. 690, 49 Stat. 1648; and was commenced by the direction of the At-

torney General of the United States at the request of the Commissioner of Internal Revenue. [Paragraph II of Complaint, Tr. pp. 2 and 3.] By the Answer of the defendant and appellant, Citizens National Trust & Savings Bank of Los Angeles [Further, Separate and Third Defense to Complaint, Tr. p. 16] it was alleged that the liens claimed by the plaintiff, United States of America, were subordinate to a lien of the defendant Bank and issue was thereby raised involving the interpretation of Revised Statutes, Section 3186, as amended by Act May 29, 1928, c. 852, Section 613, 45 Stat. 875 (U. S. C. A., Title 26, Section 3670), which provides as follows:

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.”

This appeal is taken under the provisions of Section 128 of the Judicial Code (28 U. S. C. A. §225) and pursuant to Rule 73b of the Federal Rules of Civil Procedure [Tr. pp. 45-46], from a judgment in favor of the plaintiff, United States of America, entered upon findings of fact and conclusions of law in favor of the plaintiff, United States of America, and determining the lien of the government to be prior and superior to the lien of the appellant Bank.

Statement of the Case.

The facts giving rise to this appeal and as shown by the pleadings herein are as follows:

The plaintiff, United States of America, has filed this action under the provisions of Section 3207 of the Revised Statutes (U. S. C. A., Title 26, Sec. 3678), which provides for the enforcement of a lien of the United States for taxes upon any property and rights to property whether real or personal, upon liens asserted by the plaintiff to have arisen against the defendant B. Y. Taft and perfected by the plaintiff during the year 1930-1931. [See Complaint, Paragraphs VI to XVII, Tr. pp. 3-7.]

Subsequent to the perfecting of said liens, as alleged by the plaintiff, and during the year 1938, Mary Eleanor Taft, the mother of the defendant, B. Y. Taft, died, leaving to said B. Y. Taft an undivided one-fourteenth ($1/14$) interest in her estate. [See Stipulation of Facts, Paragraph II, Tr. pp. 17-18.] Subsequent to the appointment of the executors of the estate of Mary Eleanor Taft, deceased, and on or about the 9th day of April, 1938, defendant and appellant, Citizens National Trust & Savings Bank of Los Angeles, levied a writ of execution on all of the right, title, and interest of the said B. Y. Taft in and to the estate of the said Mary Eleanor Taft, deceased, upon an execution issued on a judgment obtained by the Citizens National Trust & Savings Bank of Los Angeles against B. Y. Taft in the amount of \$17,829.00 plus interest as provided by law. [Stipulation of Facts, Paragraph III, Tr. p. 18.] Thereafter and on or about the 20th day of September, 1940, the United States Collector of Internal Revenue for the Sixth Collection District of California levied a warrant of distraint upon said property

and rights to property of said B. Y. Taft in the possession of the executors of the estate of Mary Eleanor Taft, deceased, by making demand upon said executors for the immediate surrender of such property, rights to property, money, or credits as were determined by the Court to be properly distributable to said B. Y. Taft. Said notice and demand served upon the executors as aforesaid was the only notice and demand of the plaintiff herein to the right, title, and interest of said B. Y. Taft in and to the estate of said Mary Eleanor Taft, deceased, other than the said liens recorded as alleged in plaintiff's complaint. [Stipulation of Facts, Paragraph IV, Tr. pp. 18-19.] The matter was submitted for decision by the Court upon the complaint, the answers of B. Y. Taft and of B. Y. Taft and Arthur T. Earl, as executors, and of the defendant Citizens National Trust & Savings Bank of Los Angeles, and upon the Stipulation of Facts set forth in the transcript, pages 17 to 20, upon the issue as to the priority of liens as between the plaintiff, United States, and the defendant, Citizens National Trust & Savings Bank of Los Angeles, it being the contention of the Citizens National Trust & Savings Bank that the lien claimed by the plaintiff, United States, and alleged to have arisen in 1931 did not attach to the interest of the said B. Y. Taft in and to his mother's estate as said interest was after-acquired property and therefore not subject to the lien of the Government and that no lien arose in favor of the Government until the distraint proceeding in 1940, at which time the plaintiff, United States, by such distraint proceedings took only the right, title, and interest which the defendant B. Y. Taft then had in said estate and which was then subject to the lien of the defendant Citizens National Trust & Savings Bank of Los Angeles.

The trial Court, following the submission of the case, decided the issues in favor of the plaintiff, United States, and thereupon made its findings of fact and conclusions of law wherein it found the facts to be as hereinabove set forth and as conclusions of law determined that the tax liens of the Government attached to all property and rights to property acquired by the taxpayer, B. Y. Taft, subsequent to December 5, 1930, and August 21, 1931, the dates upon which said tax liens arose, including the undivided one-fourteenth ($1/14$) interest given him by will in the estate of Mary Eleanor Taft, deceased [Conclusions of Law, Paragraph III, Tr. p. 39], and further that said liens have been at all times since 1931, and now are, good, valid, and effective against all persons [Conclusions of Law, Paragraph IV, Tr. p. 39], that the defendant, Citizens National Trust & Savings Bank of Los Angeles acquired a lien upon B. Y. Taft's one-fourteenth ($1/14$) interest in the estate of Mary Eleanor Taft, deceased, on the 9th day of April, 1938, but that said lien was junior, subordinate, and inferior to the liens of the United States for the 1926, 1927, 1928 income taxes of said B. Y. Taft [Conclusions of Law, Paragraph V, Tr. p. 40], and that the liens of the United States are superior and paramount to the rights of the defendant, Citizens National Trust & Savings Bank of Los Angeles in or to the one-fourteenth ($1/14$) interest of B. Y. Taft in the estate of Mary Eleanor Taft, deceased [Conclusions of Law, Paragraph VI, Tr. p. 40]; and thereupon made and caused to be entered a decree herein in accordance with said conclusions of law [Decree, Tr. pp. 42-44].

Specification of Errors.

It is submitted by the appellant, Citizens National Trust & Savings Bank of Los Angeles, that the trial court erred in each and all of the following particulars:

1. In determining that as a matter of law under the provisions of the laws of the United States relating to liens of the Government for taxes and particularly under the provisions of Revised Statutes, Section 3186 as amended by Act May 29, 1928 (U. S. C. A., Title 26, Section 3670), the lien of the Government for taxes attaches to after-acquired property of the tax debtor.

2. In determining that as a matter of law, under said statutory provision, the tax liens claimed by the plaintiff, United States, attached to all property and rights to property acquired by the taxpayer, B. Y. Taft, including an undivided one-fourteenth ($1/14$) interest given him by will in the estate of Mary Eleanor Taft, deceased, subsequent to December 5, 1930, and August 21, 1931, the dates upon which said tax liens arose, and in determining that said liens have been at all times since and now are good, valid, and effective as against all persons.

3. In determining that as a matter of law, under said statutory provision, the lien of the defendant, Citizens National Trust & Savings Bank of Los Angeles, upon the interest of B. Y. Taft in the estate of Mary Eleanor Taft, deceased, is junior, subordinate, and inferior to the liens of the United States for the 1926, 1927, 1928 income taxes of said B. Y. Taft, and that the liens of the United States for said income taxes are superior and paramount to the rights of any and all of the defendants herein and particularly of the defendant Citizens National Trust &

Savings Bank of Los Angeles in or to the one-fourteenth (1/14) interest of said B. Y. Taft in the estate of Mary Eleanor Taft, deceased.

4. In determining that as a matter of law, under said statutory provisions, the plaintiff, United States of America, is entitled to an order for the sale of said B. Y. Taft's undivided one-fourteenth (1/14) interest in and to the estate of Mary Eleanor Taft, deceased, under the said liens of the United States, and that the proceeds of such sale be applied upon said taxes prior to their application toward payment of the lien of the defendant Citizens National Trust & Savings Bank of Los Angeles.

Statutory Provisions Involved and Statement of Appellant's Contentions.

The provisions of the Federal statutes relating to the lien of the United States for taxes and the statutory authority for the enforcement of payment of taxes are as hereinafter set forth. Upon the construction and interpretation of these statutory provisions depends the determination of the issues raised between the Government and the appellant Bank in the instant case.

R. S., Section 3186(a) as amended by Act May 29, 1928, c. 852 (U. S. C. A., Title 26, Sections 3670 and 3671) provides:

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.

“Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of the lapse of time. 53 Stat. 449.”

R. S., Section 3186(b) (U. S. C. A., Title 26, Section 3672) provides that

“such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—(1) In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; . . .”

Subsequent sections provide for the release of the lien and for partial discharge of property.

R. S., Section 3207(a), as amended by Acts June 19, 1934, c. 651, 48 Stat. 1064; June 22, 1936, c. 690, Section 802(a), 49 Stat. 1743 (U. S. C. A., Title 26, Sec. 3678) provides as follows:

“In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property

owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

“All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court.

“The said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property and rights to property in question, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property and rights to property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

“* * * * *

In addition to the foregoing provisions relating to liens and enforcement thereof further provisions have been made for collection by distraint proceedings. These statutory provisions are as follows:

R. S., Section 3187, which was in nature of a revision of Act July 13, 1866, c. 184, Section 9, 14 Stat. 106, 107, 108; Mar. 2, 1867, c. 169, Section 8, 14 Stat. 473; as amended by Act June 2, 1924, c. 234, Section 1016, 43 Stat. 343 (U. S. C. A., Title 26, Sec. 3690), provides

“If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such inter-

est and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. 53 Stat. 451.”

R. S., Section 3188, which was in nature of a revision of Act July 13, 1866, c. 184, Section 9, 14 Stat. 107 (U. S. C. A., Title 26, Sec. 3692) provides:

“In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. 53 Stat. 452.”

R. S., Section 3194, which was in nature of a revision of Acts July 13, 1866, c. 184, Section 9, 14 Stat. 107; June 30, 1864, c. 173, Section 45, 13 Stat. 240 (U. S. C. A., Title 26, Sec. 3697) provides:

“In all cases of sale, as aforesaid, the certificate of such sale shall be *prima facie* evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and shall transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold; . . . 53 Stat. 453.”

Under the foregoing provisions relating to the lien of, and methods of collection of a Federal tax, and particu-

larly under the provisions of Section 3186(a), R. S., it was the contention of the plaintiff, United States of America, that the lien for taxes which arose and was perfected by the plaintiff against B. Y. Taft in 1930-31 was in the nature of a continuing lien and attached to all property subsequently acquired by said B. Y. Taft at the instant title vested in Taft so that the lien of the Government would be prior to any lien thereafter attaching against such property in favor of any third persons.

It is the contention of appellant Bank in the instant case that the lien given the United States under the statutory provisions hereinabove set forth is purely a statutory lien and is limited strictly to the right given by the language of the statute; that the provisions of Section 3186(a) R. S., create a lien only on property or rights to property owned by the taxpayer at the time the lien is perfected; that the said lien becomes in effect a judgment in favor of the United States which gives the United States the right to pursue property which may be after-acquired either by a proceeding under R. S., Section 3207(a) as in the instant case, or by distraint proceedings under the statutory provisions relating to distraint, hereinabove set forth, but that the claim of the Government which may be established thereby, takes effect only at such time as either of these proceedings is commenced to establish the lien against any right which a tax debtor may have in after-acquired property. That the lien thereby established does not relate back to the date of the original lien so as to cut off the rights of intervening credi-

tors or other third parties, acquired as against said after-acquired property prior to the time when the Government seeks to enforce its lien either by Court action or by distraint proceedings. In the instant case, therefore, the distraint proceedings by the Government instituted in 1940, while they may be held effective as creating a lien in favor of the United States at that time, gave the Government a lien only on the right, title, and interest which B. Y. Taft then had in the interest of his mother's estate and which was then subject to the right of the appellant Bank under its execution lien created in 1938.

The Lien Created by the Provisions of R. S., Section 3186(a) Is Purely a Statutory Creation and Is in Effect a Judgment in Favor of the United States Against the Tax Debtor.

It cannot be disputed that the lien provided in Section 3168(a), R. S., is purely a statutory lien. This rule seems to be well recognized in all cases dealing with the interpretation of the Federal Statutes relating to liens, and being a statutory lien its character, operation, and extent must be ascertained from the terms of the statute. It was said in the case of *United States v. Beaver Run Coal Co.*, 99 Fed. (2d) 610, at page 612, in referring to certain of the statutes involved herein:

“Whether a statute creating a lien is to be given a liberal or a strict construction, it is well established that ‘the character, operation and extent of the lien must be ascertained from the terms of the statute

which creates and defines it, and the lien will extend only to persons or conditions provided for by statute, and then only where there has been at least a substantial compliance with all the statutory requirements.' 37 C. J. 309, 322, 323; In re Brunquest, 4 Fed. Cas. p. 482, No. 2,055; The Suelco, D. C., 286 F. 286; Gile v. Atkins, 93 Me. 223, 44 A. 896, 74 Am. St. Rep. 341. Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded. Augustine v. Congregation of Holy Rosary of Pompeii, 213 Wis. 517, 252 N. W. 271."

The general rule as to the construction of statutory liens is found in 33 *Am. Jur.*, 432 (Liens), Sections 25 and 26. The language therein contained is as follows:

"25. Validity.—Liens created by statute are ordinarily governed by and find their efficacy within the provisions of their foundation, and their validity is entirely dependent on the terms of the statute. It is within the power of the legislature to provide for liens to secure the payment of debts and other obligations, subject to constitutional limitations. . . .

"26. Construction and Application of Statutes.— . . . It may here be stated generally that where a lien is provided for by a statute which is merely declaratory of the common law, it must be interpreted in conformity with its principles. On the other hand, where the legislature has enlarged and defined a common-law lien, its definition supersedes the definition of the courts, and thereafter, the exercise of the

powers of the courts with respect to such liens must be consistent with the legislative definition. *A lien created by statute is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute; it cannot be extended by the courts to cases not provided for by the statute, nor can it be substituted by a bond. . . .*" (Emphasis ours.)

It was held in the case of *Bull v. United States*, 55 Sup. Ct. 695, 295 U. S. 247, that the assessment made by the Collector is given the force of a judgment, the Court saying:

" . . . The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign."

The Lien Created by the Provisions of R. S., Section 3186(a) Is Limited by its Terms and Does Not Extend to Property Acquired by the Taxpayer after the Lien Arises; However, Under the Provisions of R. S., Section 3207(a) (U. S. C. A., Title 26, Sec. 3678) and R. S., Section 3188 (U. S. C. A., Title 26, Sec. 3692), the Government May Seek After-acquired Property of a Tax Debtor by Court Action or Distraint Proceedings.

Having in mind the foregoing provisions with reference to the construction of a statutory lien, let us examine the statutes hereinbefore set forth relating to the enforcement and collection of tax levies. Section 3186(a), it will be noted, provides only that the tax due "shall be a lien in favor of the United States upon all property or rights to property whether real or personal belonging to such person" and further, that "unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the Collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." There is no provision in this statute that the lien shall extend to property acquired after the lien shall arise or that the lien shall extend to all property belonging to such person or thereafter acquired by him within the period of limitation. This statute provides only that the lien shall attach to property owned by the taxpayer at the time the lien arises, and will be a lien against that property until the tax is satisfied, or until the limitation of

time within which the tax may be collected has expired. Had Congress intended that the lien provided for in said section was to extend to after-acquired property of the tax debtor, it would have been a very simple matter to have written this into the statute. In thus failing to provide in Section 3186(a) (U. S. C. A., Section 3670) that the lien should attach to after-acquired property, Congress undoubtedly believed that in enacting this statute and the subsequent sections relating to distraint proceedings and enforcement by civil action, sufficient means had been provided by which after-acquired property of a tax debtor could be reached and subjected to the payment of the tax.

In R. S., Section 3207(a) (U. S. C. A., Title 26, Section 3678), which provides for the filing of a civil action in the District Court, such as the action in the instant case, it will be noticed that that statute provides,

“that the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a District Court of the United States, to enforce the lien of the United States upon any property and rights to property whether real or personal *or to subject any such property or rights to property owned by the delinquent, or in which he has any right, title or interest to the payment of such taxes,*” (Emphasis ours.)

and further provides

“that all persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into Court.”

This provision gives the Government a right to pursue assets which may not have been subject to the lien at the time the lien arose and also shows that Congress recognized that the property sought to be subjected might have prior claims or liens against it. Again in R. S., Section 3188 (U. S. C. A., Title 26, Section 3692), it is provided that,

“the Collector may levy by distraint upon all property and rights to property belonging to such person, *or on which the lien provided in Section 3670 exists.*”
(Emphasis ours.)

and further R. S., Section 3194 (U. S. C. A., Title 26, Section 3697) provides that where a sale has been made by the Collector upon such distraint the certificate shall

“transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold.”

Here again Congress recognizes that there may be property belonging to the taxpayer which is not subject to the lien, and which may be seized by distraint, but recognizes that the Government can take only the right, title and interest then owned by the tax debtor.

Under the foregoing provisions it is clear that Congress has provided the tax collector with appropriate means to reach after-acquired property of a tax debtor, at the same time recognizing that at the time the Collector distrains or a Court action is commenced there may be rights of other parties which have attached to the property, or rights to property, of the tax debtor.

Where After-acquired Property Is Levied Upon by Distraint Proceedings or a Court Action Is Brought to Enforce Payment From After-Acquired Property, the Lien of the Government Does Not Relate Back to the Date the Original Lien Was Perfected and the Government's Claim Against Such After-Acquired Property Is Subject to Intervening Rights of Third Persons.

Numerous cases hold that the lien of the Government under the foregoing provisions may be subordinate to prior liens. Among these are the following:

Sherwood et al. v. United States, 5 Fed. (2d) 991 (where the lien of the Government was held to be subordinate to a prior mortgage);

Oden v. United States, 33 Fed. (2d) 553 (which held that foreclosure of a prior mortgage wiped out the Government's claim against specific property); and,

Minnesota Mutual Life Insurance Co. v. United States, 47 Fed. (2d) 942 (holding that a junior lien of the Government is subject to being quieted by a prior lienor).

The early case of *Stiles v. Murphy*, 4 Ohio Reports 92, 93, decided in 1829, contains language which counsel believe pertinent to the interpretation of the Federal Statutes hereinbefore referred to. In that case the question was whether a lien of a judgment attaches to after-acquired lands so as to affect the rights of a purchaser. The Court states that the question presented was decided by the Court in the case of *Roads v. Symmes* in 1 Ohio Reports, 313, but decided that a more particular examination of the question was necessary. The facts in that

case were that a judgment was recovered in June, 1822, against N. On September 4, 1822, N acquired title to the land in question. January 27, 1823, N executed a mortgage to the plaintiff's predecessor. In March, 1825, an execution was taken out on the judgment and levied upon the land, and in February, 1829, the land was sold on the execution to the defendant, which sale was confirmed and a deed was executed by the Sheriff to the defendant who claimed under it. In 1825 action was taken upon the mortgage and a judgment of execution was rendered on January 5, 1825. A levy was first made in connection with the mortgage on the property on January 1, 1828. On February 21, 1829, the property was sold to plaintiff's predecessor and the sale was confirmed and a deed executed under which plaintiff's predecessor claims. In its decision, the Court says:

“Upon a careful examination of all the authorities within our reach, the point under consideration does not appear to have been solemnly adjudged, upon full investigation, either in England or in our own country, except in Pennsylvania. Our researches have furnished but little light upon the question, and it seems not much less distinct in the mists of antiquity than in our own day. We would appear, then, to violate no settled principle, in analogous cases, by giving to our statute the construction which our circumstances and policy require. With us, the judgment creditor's lien upon the debtor's land, the right to sue, and the manner of transferring to the purchaser, are all matters of statutory regulation. The statute declares that ‘the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered.’ The writ of

fieri facias 'shall command the officer to whom it is directed, that of the goods and chattels of the debtor, he cause to be made the moneys specified in the writ; and for want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor.' It is provided in section 11 of the same act, 'that the sheriff, or other officer, who, by such writ, or writs of execution, shall sell the said lands and tenements so levied upon, or any part thereof, shall make to the purchaser or purchasers as good and sufficient a deed of conveyance for the lands and tenements so sold as the person or persons, against whom such writ or writs of execution were issued, might or could have made for the same, at any time after said lands become liable to said judgment, which deed shall be *prima facie* evidence of the legality of such sale, and the proceedings thereon, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate, in the premises therein mentioned, as was vested in the party, at or after the time when the said lands and tenements became liable to the satisfaction of the said judges.' 22 Ohio L. 108. The legislature, in giving judgments on a lien, had particularly in view the lands that the debtor held at the time when the judgment was rendered. They clearly intended the judgment should attach to these, so that a purchaser would hold them *cum onere*. The execution, according to its command, was not only intended to embrace lands upon which the judgment was a lien, but those held by the debtor at the time the execution was issued and a levy made. The command of the *fi. fa.* certainly does not embrace, in terms or literally, the lands acquired at any time posterior to the judgment, but which had been aliened before the execution issued. Such can not, with strict propriety, be said to be the 'lands of the debtor.'

They were not the lands of the debtor, and, therefore, not 'bound by the judgment.' The deed of conveyance shall be as good and sufficient as the debtor could have made at any time after the said lands became liable to the said judgment. According to our construction, the lands held by the debtor, when the judgment was rendered, as well as the lands held at the time of issuing the execution, are 'liable to judgment,' and to 'the satisfaction of the judgment.' The legislature has defined more explicitly the deed of the sheriff, and the effect of it. In giving the lien of the judgment, in the command of the *feri facias*, in the definition of the sheriff's deed, and in declaring its effect, the legislature has guarded the terms employed in the most cautious manner, to save lands of the debtor, purchased after the judgment, and aliened before execution. This inference is most strongly deduced from the command of the *feri facias*. If we are to arrive at the law of the court from the form of the *elegit*, we may surely, with equal propriety, infer the intention of the legislature, from the command of the *feri facias*, as given in the statute. It is a matter of history that this law was drafted by learned counsel, appointed as a committee of revision, who were undoubtedly exactly acquainted with the form of the *elegit*. We can not but presume many members of the legislature, who passed it, were intimately acquainted with the common and statute law touching executions. It must have been well known that the *elegit*, in form, extended itself to a moiety of all lands of the debtor, held at the date of the judgment, or of which he had been seized at any time since. If such had been the intention of the legislature, they would have framed their execution accordingly."

It is submitted that in the determination of the instant case the rule laid down in the foregoing citation applies equally well to the Federal Statutes involved herein. The Federal Statute creating the lien (R. S. 3186(a)) gives, in effect, a judgment in favor of the Government against the taxpayer, which judgment thereupon becomes a lien upon all property owned by the taxpayer at the time the lien or judgment arises, while the statutes giving the right to the Government to levy on property by distraint proceedings, or by a court proceeding to subject property to payment of the tax, are in effect the same as the "*fierifacias*" referred to in the *Stiles* case.

The only Federal cases which research of counsel has found which involved issues similar to the instant case, are the early case of *U. S. v. Pac. R. R. Company*, 1 Fed. 97 (1880), and *U. S. v. Long Island Drug Company*, 115 Fed. (2d) 983 (2d Circuit, 1940), both of which cases are mentioned and referred to by Judge Harrison in his opinion in the instant case.

While it is true that the case of *U. S. v. Pac. R. R. Company* (*supra*), arose in 1880 and was decided prior to the amendment to the Internal Revenue law by the addition of R. S., Section 3186(b) (U. S. C. A., Title 26, Section 3672) (which amendment provided that the lien of the Government should not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed); counsel believes the language therein contained to be as decisive in a determination of the instant case as it was in determining the issues then before the Court. The provision of the Federal law at that time, giving the Government a lien against the taxpayer, was in most respects similar to the provision as it reads at

present, particularly in that it gave a lien upon all property and rights to property belonging to the taxpayer. The Court in that case was confronted with the determination of the question as to the meaning of the words, “upon all property and rights of property.” The language of the Court in determining the question is as follows:

“In considering the demurrer we are called upon to construe the statute under which the lien is claimed. This statute is found in the act of July 13, 1866 (14 Stat. 107), and is also embodied in section 3186 of the Revised Statutes, and is as follows:

“‘And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States, from the time it was due until paid, with the interest, penalties and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company or corporation.’

“The question is as to the meaning of the words ‘upon all property and rights to property belonging to such person, bank, association, company or corporation.’ Does the language apply to the property belonging to the Pacific railroad when the taxes accrued, or only to that belonging to that company when the demand by which the lien was created was made? * * *

“* * * In my opinion the language of the statute does not require the construction contended for by counsel for the government. If congress had intended to make the statute so far-reaching as to subject property in the hands of innocent purchasers, who become owners years before any step was taken by the gov-

ernment to assert its lien, this intention would have been plainly expressed. Such, however, is not the case. Let us examine the phraseology: 'If any person, . . . liable to pay a tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, . . . upon all property, etc., belonging to such person,' etc. The statute does not say 'Upon all property which may have belonged to such person when the tax accrued.'

"This or similar language would, I think, have been employed if congress had intended to give the statute this effect. It must be conceded that the words 'all property . . . belonging to such person' must be construed as referring to some time to be ascertained by the context; and it may also be conceded that we might, without doing violence to the language of the law, refer them to the time when the tax became due, and make the clause read 'all property, etc., belonging to such person, etc., at the time the tax became due.' This, however, does violence to the spirit of the act for reasons already stated. Another reading is authorized by the language, and is in harmony with the spirit, and that is the one I have adopted, namely, that the words in question refer to the time when the demand is made, and may be phrased thus: 'All property, etc., belonging to such person at the time such demand is made.' By this construction the lien, when it once attaches, relates back to the time when the tax was due, but it does not attach to the property transferred to innocent purchasers prior to demand.

"* * * Nor is (this view) unjust toward the government, for it is fair to presume that the government, armed as it is with so many agencies and

appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable time, make demand, or take some steps in the direction of making collections, in all cases where there is delinquency. The government may protect itself by diligence if the view I take of the statute shall prevail; but, if the opposite view is sustained, the citizen who purchases real estate is absolutely without protection against possible liens for taxes of this character.”

There will be noted from the foregoing that the learned Judge who wrote the opinion states, “It must be considered that the words ‘all property . . . belonging to such person’ must be construed as referring to some time to be ascertained by the context,” and therein determined that the words in question refer “to the time when the demand is made.”

The learned Judge further points out that to thus hold is not unjust toward the government for it is fair to presume that the Government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid and all-powerful as it is to enforce its rights, will, within reasonable time, make demand or take some steps in the direction of making collections in all cases where there is a delinquency and that the Government may protect itself by diligence.

The holding in the *U. S. v. Pacific R. R.* case (*supra*) to the effect that rights which do not exist at the time of the demand upon the taxpayer are not subjected to any claim, is followed in the case of *U. S. v. Long Island Drug Co.* (*supra*), decided by the Second Circuit Court of Ap-

peals, December 16, 1940. That case was an appeal from a decision of the District Court of New York reported in *29 Fed. Supp.* 737, decided in 1939. In the *Long Island Drug Co.* case, the facts were that the Commissioner of Internal Revenue assessed a distilled spirit tax against Charles J. Steinberg in the amount of \$8,393.55. This assessment was made on the May, 1933, list which was signed July 1, 1933, and received in the office of the Collector of Internal Revenue on or about July 6, 1933. Notice and demand was made on Steinberg on July 14, 1933, and a warrant of distraint was issued on September 16, 1933. On April 15, 1936, a notice of lien in the amount of \$11,274.79 was filed in the office of the Clerk of the United States District Court and in the office of the Registrar of Queens County, and on the same date notice of levy, copy of the notice of lien and of the warrant of distraint was served on the defendant, Long Island Drug Co. On June 17, 1936, another notice of lien was filed for additional sums which had accrued and on the same date a notice of lien in the amount of \$11,711.68 was served on defendant, Long Island Drug Co. Finally on March 7, 1939, the Long Island Drug Co. was served with a notice of levy in the sum of \$12,777.65, a copy of the warrant of distraint, and a final demand for the surrender of said amount of money, credits, property, and property rights belonging to Steinberg and in possession of the Long Island Drug Co.

The Government in this proceeding filed an action to enforce the statutory liability against the defendant Long Island Drug Co. Inc., the complaint setting forth that on or about March 7, 1939, the defendant, Long Island Drug Co. Inc., was in possession of property or rights to

property of Charles J. Steinberg in an amount of \$12,-777.65, subject to distraint, that when the notice of levy was served, the defendant Charles J. Steinberg was an officer of the defendant Drug Company, that the defendant Drug Company failed and refused to comply with said levy and demand and failed and refused to surrender any of such property or rights to property, to-wit, \$12,-777.65. The answer of the defendant Drug Company did not deny the service of the notice, nor that it failed and refused to comply with said levy and demand but it did deny that on the date of the service of the notice on March 7, 1939, it was in possession of property or rights to property of C. J. Steinberg subject to distraint. Reading at page 739 of 29 Fed. Supp., the Court then says:

“The first affirmative defense in the answer states that at all the times mentioned Steinberg was employed by the Company and as such was entitled to his salary for his services; that the United States, acting on the assessment mentioned in the complaint, had previously served on the Company notices of levy and demand to turn over Steinberg’s money; that at that time the Company owed Steinberg nothing and had none of his property; that the United States then advised the Company that these notices affected all salary thereafter owed by the Company to Steinberg; that thereafter the Company, Steinberg and Steinberg’s wife agreed that from time to time the Company would lend to Steinberg’s wife, and Steinberg would guarantee the repayment of these loans by applying all his salary thereafter earned toward such repayment; that thereafter the Company loaned to Steinberg’s wife more than Steinberg’s salary; that the ‘alleged credit referred to in paragraph 3 of the complaint’ was merely the Company’s book

entries showing Steinberg's total salary since the agreement 'so made and entered for convenience because of the assertion of the Collector of Internal Revenue that the notice referred to in paragraph fourth hereof was effective against salaries that might be earned after the date of its service.' "

A motion for judgment on the pleadings was then made by the Government and the District Court in the opinion reported in 29 Fed. Supp. 737 granted said motion in all respects. The opinion of the trial court as to the effect of the lien of the Government on after-acquired property was in essence the same as the opinion of the trial Judge in the instant case, the Court there stating at page 740 (29 Fed. Supp.) as follows:

"In the instant case defendant has likewise sought to raise the question, by its first defense, whether it had property of the taxpayer Steinberg within the meaning of the statute. The denial that it had such property is sought to be fortified by the ultimate facts of the first defense heretofore mentioned. But the facts fail to disclose any defenses and equities of the Company pertaining to the property of Steinberg sufficient to defeat the government's paramount claim thereto. There is a fatal admission that the agreement relied upon was entered into after the notices of assessment, lien, levy and demand were served upon the Company. The assessment list when received by the Collector of Internal Revenue acted as a lien and had the same force and effect of a judgment, and continued effective and enforceable thereafter until Steinberg's liability was satisfied. 26 U. S. C. A., Sections 1560, 1561. *Bull, Executor, v. United States, supra*. No equity that the Company could assert against Steinberg's salary arose by virtue of any legal situation existing prior to the operative

facts which attached the government's lien to such salary, and the Company was at all times apprised of the existing claim of priority. The purpose of the statute is not to be thwarted by the absence of a clearly defined moment when the lien may be said to have attached to the property in issue. Cf. *United States v. Canfield*, 29 F. Supp. 734 (United States District Court for the Southern District of California, decided July 24, 1939; C. C. N. Tax Service, Section 9841). The moment is fixed in the setting of the occasion to give prior validity to the government's lien in the property of the taxpayer as against any rights of the defendant Company under facts in the nature here presented. To hold otherwise the purpose of the statute as heretofore stated will be easily defeated, and sanction would be given to a simple evasion device. The first defense, therefore, is insufficient as a matter of law."

The Circuit Court of Appeals having before it the same facts and presumably the opinion of the lower court, expressing the opinion which we have hereinabove quoted, adopted a different and contrary view, reversing the holding of the trial Judge on the ground that at the time of the levy in March, 1939, the defendant Drug Co. had no property or rights to property belonging to the defendant Steinberg by reason of the facts set forth.

With reference to after-acquired property the Hon. Augustus N. Hand says in his decision reported in 115 Fed. (2d) 983, reading at page 986:

"Though we shall assume that a salary or wages which have been earned may be made subject to a lien for unpaid taxes and also subject to distraint and levy, the situation in respect to future earnings

is quite different. They are contingent upon performance of a contract of service and represent no existing rights of property. They are quite distinguishable from the right of a *cestui que* trust whose equitable life estate may be subjected to a lien on behalf of the government for unpaid taxes. *Matter of Rosenberg's Will*, 269 N. Y. 247, 199 N. E. 206, 105 A. L. R. 1238; *United States v. Canfield*, 9 Cir., 29 F. Supp. 734. In the same way they are distinguishable from a taxpayer's interest in an insurance policy upon his life, *Kyle v. McGuirk*, 3 Cir., 82 F. 2d 212; *Cannon v. Nicholas*, 10 Cir., 80 F. 2d 934. Neither right of the taxpayer is contingent but is a fixed right to realize property or income derived therefrom dependent upon no future performance. Rights which do not exist at the time of the demand upon the taxpayer are not subjected to any lien. *United States v. Pacific R. R.*, C. C. Mo., 1 F. 97. Here there was no showing that the taxpayer had any claim against the Drug Company when the demand upon him for payment was made.

"On April 15, 1936, when the Collector served its first notice of lien and demand on the Long Island Drug Company, Inc., nothing was due Steinberg from the Company but he then owed the latter \$4,-711.13. Between that date and March 7, 1939, when the second demand was made on the Company, a contract had been made by it with Steinberg whereby any indebtedness of Steinberg, as surety, might be applied to sums becoming due for his salary. There was an indebtedness of Steinberg at the time of such demand which had been set off pursuant to the agreement.

"In the absence of a statute to the contrary, it is the usual rule that a garnishment does not affect

future earnings or salary. *Savings Bank of Danbury v. Loewe*, 242 U. S. 357, 37 S. Ct. 172, 61 L. Ed. 360. Moreover, there would seem to be no justice in depriving the garnishee of its right to set off which, so far as the record shows was acquired for a valuable consideration before the demand was made on the Drug Company by the Collector. Both on April 15, 1936, when payment was first demanded of the Drug Company, and on March 7, 1939, when the last demand was made, the latter owed no debt to Steinberg upon which distraint could be made. We find nothing in Section 3690 or Section 3710 which varies the general rule that a garnishee process is not to be extended to future earnings, but will only reach an indebtedness which has accrued.

“It appears from the foregoing that there was no lien upon any earnings of Steinberg on April 15, 1936, or accruing thereafter, and that he had no accrued earnings upon the dates upon which a levy was attempted. Accordingly the Long Island Drug Company, Inc., had no property which it could be required to surrender by reason of the provision of 26 U. S. C. A. Int. Rev. Code, Section 3710.”

Had the Circuit Court in the *Long Island Drug Company* case adopted the construction as to liens given by the trial court, or had it followed the same reasoning as the trial Judge in the instant case, certainly it could not have reached the conclusion which it did, for, under the theory of the trial Judge, the earnings of the tax debtor being property, the lien of the Government would have attached at the instant they became due to him and the rights of the Long Island Drug Company to the earnings would have been subject to the claim of the Government.

Counsel for appellant feel that the *Long Island Drug Company* case, *supra*, decided in 1940 under the same statutes relating to the government's lien for taxes confronted in the instant case, is decisive of the question presented in the instant appeal, that the lien of the Government as to after acquired property does not attach until such time as distraint proceedings or a creditor's suit to establish a lien have been made effective by the Government, and does not relate back to the date of the original lien.

Conclusion.

In the instant case the property of the tax debtor involved consists of an interest in his mother's estate. This interest did not arise until the date of her death in 1938 and then the only interest that the tax debtor acquired was under the will of the deceased. Clearly, therefore, in 1930 and 1931 when the Government perfected a tax lien against the debtor under the provisions of R. S. 3186(a), the lien did not attach and could not attach to this property. The first claim that the Government made against this property was by the distraint proceeding in 1940 and it is submitted that under the holdings in the *Pacific R. R. Company* and the *Long Island Drug Company* cases, *supra*, the lien did not attach to the interest in the estate under the provisions of said statute and that any interest or claim of the Government arose only by virtue of the levy of distraint proceedings at which time the interest of the tax debtor in said estate was subject to the claim of appellant bank under its execution which had been levied in 1938 shortly after the interest arose.

To reason thus and to hold in accordance therewith does no injustice to the Government for it is armed with a great many more means of finding and obtaining property

of a tax debtor than is an ordinary judgment creditor and if the Government is lax in enforcing its claims, it should not be given a preference over a judgment creditor who has been more diligent in locating and reducing to possession after-acquired property.

It is respectfully submitted, therefore, that in the determination of the issues raised in this appeal this Honorable Court should hold that under the provisions of R. S., Section 3186(a) the lien created thereby is in effect a judgment and a lien against all property owned by the tax debtor at the time said lien arises as provided in said statute; that said lien does not attach to after-acquired property of the tax debtor except by distraint proceedings or a court action commenced by the Government under the statutes pertaining thereto, and that the right of the Government to after-acquired property thus subjected to the Government's claim by such distraint or court proceedings is subject to any and all rights against said property which may be in existence at the time such distraint proceedings or court action is commenced. In the instant case, therefore, it should be determined that the lien of the appellant bank is prior and superior to the lien of the Federal Government arising under the distraint proceedings in 1940 and that the decree in the instant case should provide that the interest of defendant B. Y. Taft in the estate of Mary Eleanor Taft, deceased, should be first applied to the payment of the claim of appellant bank under its execution and that any moneys remaining thereafter should be applied against the Government's claim.

Respectfully submitted,

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Attorneys for Defendant and Appellant.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

3

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA, B. Y. TAFT, and B. Y.
TAFT and ARTHUR T. EARL, as Executors of the Estate
of MARY ELEANOR TAFT, Deceased,

Appellees.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

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U. S. Post Office and Court House
Building, Los Angeles,

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No. 10232.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA, B. Y. TAFT, and B. Y.
TAFT and ARTHUR T. EARL, as Executors of the Estate
of MARY ELEANOR TAFT, Deceased,

Appellees.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The only previous opinion in this case is that of the District Court [R. 20-35] which is reported *sub nom. United States v. Taft et al.*, 44 F. Supp. 564.

Jurisdiction.

This appeal involves the enforcement of a federal tax lien in the amount of \$6,471.07, with interest, for taxes assessed against B. Y. Taft for the years 1926, 1927 and 1928 under the provisions of Sections 210 and 211 of the Revenue Act of 1926 and Sections 11 and 12 of the

Revenue Act of 1928. The taxpayer having refused or neglected to pay such amount, the Attorney General, at the request of the Commissioner of Internal Revenue, directed a civil action to be filed in the District Court to enforce the lien of the United States for such unpaid taxes, pursuant to Section 3678 of the Internal Revenue Code. The complaint in said suit was filed on July 25, 1941. [R. 9.] The answer of appellant was filed October 24, 1941. [R. 17.] The appellant herein, the Citizens National Trust & Savings Bank of Los Angeles, claiming an interest in the property of taxpayer, was made a party defendant pursuant to subsection (b) of Section 3678.

The judgment of the District Court in favor of the United States was entered on April 20, 1942. [R. 35.] The notice of appeal was filed July 16, 1942. [R. 46.] The jurisdiction of this Court is invoked under Section 128 of the Judicial Code and pursuant to Rule 73(b) of the Federal Rules of Civil Procedure.

Question Presented.

On December 5, 1930, and August 21, 1931, the Collector of Internal Revenue at Los Angeles received the assessment lists covering the federal income taxes of B. Y. Taft for the years 1926, 1927 and 1928. Under the provisions of Section 3186(a) of the Revised Statutes, now Section 3670 of the Internal Revenue Code, the United States thereby acquired liens upon all property and rights to property belonging to the taxpayer. Under other provisions of Section 3186(a) of the Revised Statutes, now Section 3671 of the Internal Revenue Code, these liens have continued to the present time and remain in force by reason of the taxpayer having waived all statutes of limitation which might otherwise have applied.

The question is whether these liens attach to property acquired by the taxpayer *after* December 5, 1930, and August 21, 1931, when they became perfected liens. If so, the liens of the United States are superior and paramount to the rights of the appellant under its execution lien created in 1938.

Statutes Involved.

Revised Statutes, as amended by Section 613, Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 3186. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * *

Internal Revenue Code:

SEC. 3678. CIVIL ACTION TO ENFORCE LIEN ON PROPERTY.

(a) *Filing*.—In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to

property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

(b) *Parties to Proceedings.*—All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court. (U. S. C. 1940 ed., Title 26, Sec. 3678.)

Statement.

The facts as found by the District Court may be summarized as follows: All of the allegations of fact contained in paragraphs I-XVIII inclusive of the complaint [R. 2-7] are true and correct. [R. 36.] Among those facts are the following:

Federal income taxes were assessed against B. Y. Taft for the years 1926, 1927 and 1928. [R. 3-4.] The sums of \$1,045.50, \$4,853.40 and \$572.17 for those years remain unpaid upon such assessments. [R. 4.] The 1926 and 1927 assessment lists were received by the Collector of Internal Revenue on December 5, 1930, and the 1928 assessment list was received on August 21, 1931. [R. 5.]

The Government gave notice to and demanded payment from the taxpayer on or about December 6, 1930, January 31, 1931, August 22, 1931, and October 9, 1931. [R. 5.]

Warrants of distraint for the collection of such taxes were issued on February 14 and December 1, 1931. [R. 5.] On February 13, 1931, the Collector of Internal Revenue filed notices of liens, securing the tax assessments for 1926 and 1927, with the clerk of the District Court for the Southern District of California. [R. 5-6.] On February 18, 1931, similar notices were filed with the county recorder of Los Angeles County. [R. 6.] On December 7, 1931, a like notice of lien covering the 1928 tax assessment was recorded in the District Court for the Southern District of California and in the office of the county recorder of Los Angeles County. [R. 7.]

On November 7, 1932, B. Y. Taft and the United States entered into an agreement in writing which was signed by B. Y. Taft and the Commissioner whereby it was agreed that the amounts of \$1,057.02, \$4,853.40 and \$572.17, representing assessments of income taxes, might be collected from B. Y. Taft by distraint or by a proceeding in court begun at any time. [R. 4, 21.]

On or about March 9, 1938, the appellant, Citizens National Trust & Savings Bank, Los Angeles, obtained a judgment against B. Y. Taft in the Superior Court of Los Angeles County for the sum of \$17,829 plus interest. [R. 36-37.]

On or about March 13, 1938, one Mary Eleanor Taft died, leaving the taxpayer, B. Y. Taft, as one of her devisees and legatees entitling him to succeed to an undivided one-fourteenth interest in her estate. [R. 36.]

On or about April 9, 1938, a writ of execution under the judgment obtained by the appellant bank was levied on the interest of B. Y. Taft in the estate of Mary Eleanor Taft. [R. 37.]

On or about September 20, 1940, the Collector of Internal Revenue for the Sixth Collection District of Cali-

fornia levied a warrant of distraint upon the property and rights to property of B. Y. Taft in the possession of the executors of the estate of Mary Eleanor Taft, by making demand upon the executors for the immediate surrender of such property, rights to property, money, or credits as were determined by the court to be properly distributable to B. Y. Taft. [R. 37.] This demand was the only notice other than that imported by the recorded notices of tax liens. [R. 37.]

The appellant had no actual knowledge or notice of the liens and claim of the Government other than the notice arising from recordation of the tax liens. [R. 38.]

The appellant raises no question as to the effect of the waiver of the statute of limitations, which it is acknowledged the taxpayer, B. Y. Taft, signed on November 7, 1932. [R. 38.]

In the Government's suit to enforce its lien, the District Court held, as a matter of law, that by virtue of Section 3186(a) of the Revised Statutes, now Section 3670 of the Internal Revenue Code, the United States acquired a lien upon all property and rights to property belonging to the taxpayer as of the dates the Collector of Internal Revenue received the assessment lists covering the federal income taxes of the taxpayer for the years 1926, 1927 and 1928 [R. 38]; that under the provisions of Section 3186(a) of the Revised Statutes, now Section 3671 of the Internal Revenue Code, these tax liens have continued from the date the assessment lists were received to the present time and are still in force. [R. 38-39.]

The court also found, as a matter of law, that these liens attach to all property and rights to property acquired by the taxpayer, including the undivided one-fourteenth interest given him by the will of Mary Eleanor Taft, subsequent to the date on which the tax liens arose [R. 39];

that the Government's liens are superior and paramount to the rights of any and all defendants in that suit in or to the one-fourteenth interest of the taxpayer in the estate of Mary Eleanor Taft [R. 40]; that the taxpayer, B. Y. Taft, is indebted to the Government in the sum of \$6,471.07 together with interest thereon as allowed by law [R. 40], and that the United States is entitled to an order for the sale of the taxpayer's undivided one-fourteenth interest in and to the estate of Mary Eleanor Taft under the liens of the United States and that the proceeds of such sale be applied upon said taxes, or if the one-fourteenth interest has been reduced to cash, the executors of the estate should surrender the same to the United States of America or its Collector of Internal Revenue. [R. 40-41.]

Summary of Argument.

The statutes granting a lien to the United States for unpaid federal taxes refer broadly to "all property or property rights" of the taxpayer and state that a tax lien shall "continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time". This broad language with the provision for continuation clearly indicates a legislative intention to include "after-acquired" property of the taxpayer. Such a rule of construction is supported by considerations of sound policy and the analogous state rules as to the effect of judgments with respect to after-acquired property. The cases cited by appellant are completely distinguishable since they make no direct ruling as to after-acquired property but merely rule as to the status of the purchasers or other parties having in their possession property owned by the taxpayer at the time the tax lien is perfected and not acquired by him subsequent to that date.

ARGUMENT.

The Broad Language of Section 3186 of the Revised Statutes Granting a Lien to the Government Covers Property Acquired Subsequent to the Perfection of the Lien.

The District Court has correctly construed Section 3186 of the Revised Statutes and it is found that there is no basis for excluding after-acquired property of the taxpayer from the operation of the federal tax lien provided by these sections. Section 3186 provides that if "any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon *all* property and rights to property, whether real or personal, belonging to such person." (*Italics supplied.*) No word in the English language is more inclusive than the word "all". In the absence of clear intention on the part of Congress to limit its meaning, there is no reason to apply a definition foreign to accepted usage. This is particularly true where a revenue-collecting statute is the subject of interpretation.

Appellant's argument that the lien given the United States under the provisions here in question is purely a statutory lien and is limited strictly to the right given by the language of the statute, appears to us to be in conflict with the interpretation here asked by appellant. When a statute is to be strictly construed, it is not permissible to narrow its concise language. It has been said that the policy of the statute is to reach all income subject to the federal power (*Helvering v. Stockholms etc. Bank*, 293 U. S. 84, 89). It would be a strange anomaly to give a narrow meaning to the enforcement provisions of such an Act and thus to limit its practical operation.

In *Cannon v. Nicholas*, 80 F. 2d 934, 936 (C. C. A. 10th) the Court in discussing whether an annuity contract was subject to taxes and to distraint, said:

* * * it is clear that Congress intended to subject all of a taxpayer's property except that specifically exempted to the payment of taxes.

Since the enactment of the original Section 3186 of the Revised Statutes, the word "all" has remained in the statute. There have been other changes made by Congress which we shall discuss in this brief, but no amendment made reflects any desire on the part of Congress to limit the meaning of the word "all".

Section 3186 also provides that "Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the Collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

This language found in the original lien provision, Section 3186, was "from the time it was due until paid". In 1879 in the Act of March 1, 1879, c. 125, 20 Stat. 327, the words "from the time it was due" were changed to "when the assessment list was received by the Collector". Congress, by the Revenue Act of 1913, for the first time, made provision for the protection of mortgages, purchasers, and judgment creditors, by providing that liens arising under the tax lien provision should not be valid against them until notice of such liens should be filed by the Collector. An amendment, not relevant here, was made as to the recording of such notices by the Revenue Act of 1925. Again, in 1928 only a slight change in this language was made by Section 613 of the Revenue Act of 1928, *supra*. The word "when" was changed to "at

the time” the assessment list was received by the Collector. The 1928 amendment also made a significant change in other language. It provided that the lien should “*continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.*” (Italics supplied.)

It is true, the statute still made no direct mention of after-acquired property, but it described property subject to a lien as “all” property. It also provided that the lien should “continue” until the events stated in the quoted language took place. If it should be held that the federal tax lien attached only to property or property rights owned by the taxpayer at the time the lien was perfected, this language added by the 1928 Act would be robbed of virtually all meaning. Under the previous unamended section, the lien would “continue” in any event as to property owned at the time the lien was perfected. It would “continue” as to such property without explicit provision until it expired or was removed. It would hardly exist for just the moment when it was perfected. Why then a specific provision? The additional language certainly strongly suggests that the *continuation* was affirmative to the sense that the lien stood ready at any moment to attach to *all the property which the taxpayer should subsequently acquire*. It is submitted that the language “continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time” must not be read out of the statute, but must be regarded as having some definite purpose, and that the only reasonable statutory construction is that it covers any and all property which the taxpayer may own at any time until the lien is satisfied or becomes unenforceable.

Although not discussing after-acquired property, this Court in *MacKenzie v. United States*, 109 F. 2d 540, 542, said:

The statute is unambiguous and all-inclusive, and does not admit of any construction which would exclude a bank account.

We believe the statute is equally all-inclusive as to after-acquired property.

Also, as the District Court has pointed out, the long-standing departmental interpretation of these sections is entitled to great weight and should not be disregarded without cogent and persuasive reasons. *Baltzell v. Mitchell*, 3 F. 2d 428 (C. C. A. 1st); *Maryland Casualty Co. v. United States*, 251 U. S. 342. See also, *Spring City Foundry Co. v. Commissioner*, 292 U. S. 182, 189, rehearing denied 292 U. S. 613; *United States v. Kirby Lumber Co.*, 284 U. S. 1, 3. This Court has long adhered to this general principle. Cf. *Bent v. Commissioner*, 56 F. 2d 99; *Trust No. 5833, Security-First Nat. Bank v. Welch*, 54 F. 2d 323.

In connection with Section 613 of the 1928 Act, amending Section 3186 of the Revised Statutes, in regard to the release of tax liens, G. C. M. 4715, VII-2 Cum. Bull. 94 (1928) distinguishes between a *removal* and a *release* of a tax lien. This memorandum ruled that the release provision did not require the removal of the Government's lien before expiration of the statutory period of limitations because the taxpayer *might acquire other property* to which the lien might attach prior to the expiration of that period. The language of that ruling is as follows:

Assuming the fact of the foreclosed prior mortgage and all other facts to be stated, it is the opinion

of this office that the above quoted section of the law does not mean that the Government's lien against the property of a taxpayer should be released before the 6 year period governing collection has expired, for the reason that it is altogether probable that a delinquent taxpayer may at any time prior to the expiration of the statutory period of limitations become possessed of property against which the lien may attach, thus making the tax liability enforceable through the lien.

Treasury Decision 4275, VIII-2 Cum. Bull. 168 (1929), dealing with the release and discharge of liens, clearly establishes the departmental treatment of after-acquired property. This formal Treasury Decision provided in part:

Tax liabilities frequently are unenforceable in fact for the time being, due to the temporary nonpossession by the taxpayer of discoverable property or property rights. In all cases the liability for the payment of the tax continues until satisfaction of the tax in full or until the expiration of the statutory period for collection, including such period as the taxpayer by consent in writing may agree with the Commissioner shall constitute the time within which the tax assessed may lawfully be collected. Collectors should continue to investigate carefully all cases of delinquent taxpayers where notice of lien has been filed, with a view of obtaining, before the expiration of the collection period, such written consent for the extension of the collection period, *whenever it is reasonably possible that the taxpayer may, in the future, acquire property or property rights from which the tax liability may be satisfied.* (Italics supplied.)

In *Graves v. Commissioner*, 12 B. T. A. 124, 133, the Board of Tax Appeals said as to liens:

It relates back from the time of notice and demand to the time when the assessment list was received by the collector, and it attaches upon such property as the taxpayer has at the time the lien arises, that is, at the time of notice and demand, *United States v. Pacific R. R.*, 1 F. 97, and, of course, to all the property that the tax debtor subsequently acquires. (Italics supplied.)

Cf. *Minnesota Mut. Life Ins. Co. v. United States*, 47 F. 2d 942 (N. D. Texas), in which it was held that the lien is not extinguished, but that it remains as to the property to be acquired. See also Treasury Decision 4275, *supra*.

Since Treasury Decision 4275, *supra*, was promulgated, and since *Graves v. Commissioner*, *supra*, was decided, Congress has twice amended Section 3186 of the Revised Statutes without making specific provision as to after-acquired property. The rule enunciated in *National Lead Co. v. United States*, 252 U. S. 140, therefore appears to be applicable. The Supreme Court, in this last case, said (pp. 145-146):

From *Edwards v. Darby*, 12 Wheat. 206, to *Jacobs v. Prichard*, 223 U. S. 200, it has been the settled law that when uncertainty or ambiguity, such as we have here, is found in a statute great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect,—especially where such construction has been long continued, as it was in this case for almost forty years before the petition was filed. *United States v. Hill*, 120 U. S. 169.

To this we must add that the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed, particularly as applied to linseed and its products.

It should also be noted that provision is made in Section 3679 of the Code for clearing title to real estate covered by liens created under Section 3670. In several cases it has been held that a decree freeing property from a lien does not extinguish the lien. Cf. *Sherwood v. United States*, 5 F. 2d 991 (E. D. N. Y.); *Minnesota Mut. Life Ins. Co. v. United States*, *supra*. There is no purpose to these decisions in regard to keeping a lien in effect, except the purpose of enabling the lien to attach itself to after-acquired property. The decision cited must therefore be regarded as authorities in favor of the contention of the Government that the lien of the United States applies to after-acquired property.

In *United States v. Worley* (S. D. Ind.), decided March 8, 1940 (1940 C. C. H., par. 9694), the United States brought suit against the Crystal Petroleum Corporation and its officers to collect taxes due from one Worley from sums which had not been paid to him when certain amounts had been paid to officers and employees as bonuses. The District Court had previously held that such sums actually represented dividends. The court held that since those sums represented dividends, the United States was entitled to the share properly payable to the taxpayer-stockholder upon whose stock a tax lien had previously attached. The court said:

The plaintiff, the United States, holds and is entitled to a lien by reason of its notice of levy of July 8, 1932, upon 490 shares of the no par value capital stock of the defendant Crystal Flash Petroleum Cor-

poration standing in the name of the defendant Worley, *and upon all sums* of money owing to said defendant Worley from said defendant Crystal Flash Petroleum Corporation *on or after* said 8th day of July, 1932. (Italics supplied.)

This statement is also made in the court's special findings of fact:

* * * said stock ever since July 8, 1932, has been in the possession of plaintiff and by said lien the plaintiff the United States ever since has been and now is entitled to 49% of any dividends paid by said Company since that time.

Dividends certainly are not property prior to their declaration. Neither are they rights to property unless and until they are declared. They are only rights to property if they come into existence. Property or rights to property which come into existence by virtue of testamentary disposition or by the laws of descent or distribution would seem to be as fully subject to a government lien as dividends.

Although the income received from trust funds does not seem to have been discussed as after-acquired property, as such, it has been held that it is subject to a lien which attached previous to the accrual of income. Cf. *In re Rosenberg's Will*, 269 N. Y. 247; *United States v. Canfield*, 29 F. Supp. 734 (S. D. Cal.).

Appellant cites two cases as controlling the present case, though admitting that the issues involved are but "similar" to the issue in the case at bar. The first of these is *United States v. Pacific Railroad*, 1 Fed. 97 (C. C. E. D. Mo.), decided in 1880, prior to the amendment of 1913, which provided that a tax lien should no longer be

valid as to purchasers, mortgagees, or judgment creditors until notice of it had been recorded. This case was also decided prior to the 1928 amendment, which provided that the lien should “continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time”. In the *Pacific Railroad* case there was no question of a lien attaching to after-acquired property. The question was whether the lien attached to property which had belonged to the taxpayer and had been conveyed to *innocent purchasers* prior to any demand and perfection of the lien, and the precise point was the sufficiency of a demand. The court’s undeniable concern was with the impact of the lien rule upon an innocent purchaser, and the avoidance of secret liens. The court, in construing the language “from the time it was due until paid”, to mean, “at the time such demand is made”, said (p. 100):

By this construction the lien, when it once attaches, relates back to the time when the tax was due, but it does not attach to the property transferred to innocent purchasers prior to demand. This view also harmonizes with the general policy of the law relating to land titles, which is to protect the citizen against loss from secret liens, not disclosed by any public record nor ascertainable by due diligence.

In the absence of any statutory protection against secret liens, this decision was unquestionably made in the interest of justice. The court said (p. 99):

* * * the statute should not be construed as subjecting property which has been conveyed to innocent purchasers, prior to any demand, unless this is its plain meaning.

In spite of the inequities which the court was attempting to prevent, we believe the decision in that case was incorrect in so far as it concluded that it was not the purpose of that statute to subject to the lien, property in the hands of purchasers who had no knowledge of an existing lien. Cf. *United States v. Snyder*, 149 U. S. 210; *United States v. Curry*, 201 Fed. 371 (Md.). And we believe we find support for that view in this court's decision in *MacKenzie v. United States*, *supra*, wherein it is said (p. 542):

Decisions under the Act prior to 1913 repeatedly held that no third parties, not even innocent purchasers for value, were protected under any circumstances from an unrecorded tax lien. Citing *United States v. Snyder*, 149 U. S. 210.

However, since the *Pacific Railroad* case did not involve after-acquired property, the decision can be nothing more than *dictum* as to such property. The case at bar involves neither innocent purchasers nor property which the taxpayer had owned and disposed of by any method; and, if it did, there is now statutory provision for the protection of purchasers and transferees. In view of these facts, there is no possible basis for referring to a decision of the vintage of 1880.

The second case cited by appellant as controlling is *United States v. Long Island Drug Co.*, 115 F. 2d 983 (C. C. A. 2d). The question in this case was whether the Long Island Drug Company was liable under Section 3710 of the Internal Revenue Code for failure to surrender sums of money allegedly due the taxpayer. It was found by the court that, at the time the collector served its first notice of lien and demand on the Long Island Drug Company, the company owed the taxpayer nothing.

Instead, the taxpayer was indebted to the company. A second demand was made upon the company and by that time the taxpayer and the company had entered into a contract whereby any indebtedness of the taxpayer as surety might be applied to sums coming due as salary of the taxpayer. At the time this demand was made, there was indebtedness of the taxpayer which had been set off pursuant to the agreement.

The court seemed to adopt the *dictum* set forth in the *United States v. Pacific Railroad, supra*, and said (p. 986): "Rights which do not exist at the time of demand upon the taxpayer are not subject to any lien." But since the *Long Island Drug Company* case arose under Section 3710 of the Internal Revenue Code, the basic question was whether the company was in possession of funds belonging to the taxpayer at the time notice of lien was served upon the company. The court found that the company did not have property of the taxpayer in its possession. This case, then, is not controlling here. Cf. *United States v. Warren R. Co.*, 127 F. 2d 134 (C. C. A. 2d).

The District Court, in the case at bar, having in mind the *Long Island Drug* opinion and its approval of the *Pacific Railroad* case, said [R. 27], "but the opinion discloses that the court failed to consider that the reason on which this decision is predicated ceased to exist when Section 3186 of the Rev. Stat. was amended so as to require the recording of notice to render the lien valid as against innocent purchasers."

We respectfully submit that neither of the two cases just discussed is determinative of the present case: First, for the reason that neither of them dealt with the specific question of property unquestionably held by the taxpayer, but acquired by him subsequent to the perfection of a tax lien; and second, for the reason that neither of them had under consideration the amended statutes which are applicable here.

While there may not be exact similarity between a judgment and a federal tax lien, there is certainly a fair analogy. The District Court was properly impressed by the analogy. In *Bull v. United States*, 295 U. S. 247, it was held that a federal tax lien has the effect of a judgment. The District Court, in the case at bar, developing its reasoning from this analogy, has pointed out that the great weight of authority holds in favor of the view that judgments are liens on after-acquired property where the statute fails to provide specifically for the inclusion of such property under the lien. It is submitted that this reasoning of the state courts is controlling in the case at bar. Cf. *Coad v. Cowhick*, 9 Wyo. 316; *Steele v. Taylor*, 1 Minn. 274; *Babcock v. Jones*, 15 Kans. 296; *Ralston v. Field*, 32 Ga. 453; *Trustees R. E. Bank v. Watson & Hubbard*, 13 Ark. 74; *Atlas Portland Cement Co. v. Fox*, 265 Fed. 444-446 (App. D. C.); *Colt v. Du Bois*, 7 Neb. 391; 15 R. C. L. 802.

Conclusion.

The Government has a tax lien upon all of the taxpayer's property and rights to property, which lien arose at the time the assessment list was received by the collector. The lien was perfected in 1930 and 1931. This lien attached to "all" of the taxpayer's property, including but not excluding property which he acquired thereafter. The taxpayer's liability for the amount of taxes assessed has not been satisfied, nor has it become unenforceable by reason of lapse of time. The liability, therefore, continues and will continue until such time as it is satisfied or is unenforceable. The lien is a continuing lien and attaches to the property which the taxpayer inherited in 1938.

Respectfully submitted,

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November, 1942.

No. 10232

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA, B. Y. TAFT, and B. Y.
TAFT and ARTHUR T. EARL, as Executors of the Estate
of Mary Eleanor Taft, Deceased,

Appellees.

APPELLANT'S REPLY BRIEF.

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Appellees.

APPELLANT'S REPLY BRIEF.

The Words "All Property" Used in Section 3186 of the Revised Statutes Refer to Property Belonging to the Tax Debtor Which Is in Being at the Time the Lien Is Perfected, Whether Said Property Is Real or Personal or Tangible or Intangible; It Does Not Mean All Property Which the Tax Debtor May Acquire During His Lifetime or Within the Period of Limitation.

Counsel for the Government in their argument state that no word in the English language is more inclusive than the word "all" and urge that in the absence of clear intention on the part of Congress to limit its meaning

there is no reason to apply a definition foreign to accepted usage. Appellant contends that the interpretation of the words "all property" (belonging to the tax debtor) to mean *any and all property or rights to property whether real or personal or tangible or intangible belonging to the debtor at the time the lien is perfected* is a definition not contrary or foreign to accepted usage and is a clear expression of the intention on the part of Congress not to limit the lien to a specific type of property, but to extend the lien to all forms and types of property which the tax debtor owns at the time the lien attaches.

This construction is in accord with the thought of the Judge who decided the case of *United States v. Pac. R. R. Company*, 1 Fed. 97, referred to in appellant's opening brief, when he stated:

"It must be conceded that the words 'all property . . . belonging to such person' must be construed as referring to some time to be ascertained by the context; and it may also be conceded that we might, without doing violence to the language of the law, refer them to the time when the tax became due. . . . Another reading is authorized by the language, and is in harmony with the spirit, and that is the one I have adopted, namely, that the words in question refer to the time when the demand is made, . . ."

It was obviously to remedy the statutory law as it existed at the time of this decision and to correct the errors pointed out in the decision of this case, and to provide for the protection of third persons as to property in being at the time the lien of the Government was asserted, that the amendments of the statutes referred to by counsel for

the Government, at page 9 of the brief for the United States, were enacted.

The case of *Cannon v. Nicholas*, 80 Fed. (2d) 934, 936, referred to in respondent's brief at page 9, is clearly in line with the reasoning urged by appellant as to the meaning of the words "all property," it there being held that the words "all property" included rights under an annuity contract in which the tax debtor had an interest, at the time the lien was perfected.

Also in the case of *MacKenzie v. United States*, 109 Fed. (2d) 540, referred to in respondent's brief at the top of page 11, it was held that the words "all property" did not exclude a bank account.

The following cases cited by respondent in its brief at pages 14 and 15, to wit:

United States v. Worley (S. D. Ind.), decided March 8, 1940 (1940 C. C. H., par. 9694);

In re Rosenberg's Will, 269 N. Y. 247; and

United States v. Canfield, 29 Fed. Supp. 734 (S. D. Cal.);

are all clearly distinguishable when it is considered that the lien of the Government in each of those cases had attached to property in being at the time the lien was perfected and that the rights under consideration followed from the ownership or right to possession of said property. Thus in the *Worley* case it was held that the lien of the Government having attached to the shares of stock, the money thereafter becoming due as dividends on said stock was subject to the Government's claim and in the *Rosenberg* and *Canfield* cases the property in question, which

was an interest in trust funds, carried with it the right to receive the income from the trust. To take an analogous case let us assume that under a judgment of the State Court a judgment creditor runs an execution against shares of stock in a corporation; from the rights acquired to the stock the rights to receive the dividends would follow. Thus in the instant case, assuming that the right of Taft to a share of his mother's estate was in being at the time the lien of the Government was perfected in 1932, by its lien the Government would have had the right to receive any additional income or property of the estate which might thereafter accrue to Taft during the administration of the estate; however, in the instant case at the time the lien of the Government was perfected there was no property or right to property in existence to which the lien could attach and the only manner in which said property could be reached was not by virtue of the lien, *ipso facto*, but through the right which the Government had by virtue of its lien to subject after-acquired property by Court proceedings or distraint.

As pointed out in appellant's opening brief and conceded by the Government in its reply brief, under the holding in *Bull v. United States*, 295 U. S. 247, the Federal tax lien created under the provisions of R. S., Section 3186a, has the effect of a judgment. With the analogy between the Federal tax lien and a judgment in mind, the rights and powers of the Government by virtue of its tax lien may perhaps be better analyzed. Under state laws relating to judgments the obtaining of a judgment against an individual does not of itself give a lien upon assets of the judgment debtor. However, state laws in most cases have provided that by recording an abstract of the judgment a lien is created which will at-

attach to *real property* belonging to the judgment debtor. The only manner in which personal property may be reached, however, is by execution or garnishment, and rights to property in the hands of third parties may be reached by a creditor's suit. A judgment does not of itself create a lien upon all property belonging to the judgment debtor. Congress recognizing this fact provided for a more far-reaching lien under its "judgment." Under the common law rule it was held that a judgment would attach to after-acquired real property but personal property and chattels of the judgment debtor were reached by means of execution and there was no lien against such personal property or chattels or property in the hands of third persons by virtue of the judgment. Congress, therefore, in enacting R. S., Section 3186a, did not adopt the provisions of the common law and under the cases which appellant has cited in its opening brief the rights which the Government has under its tax lien must be determined from the language of the statute itself.

To hold that under the provisions of the Federal Statutes creating a lien, the lien attaches to all property of the tax debtor which might be after-acquired would raise many and varied problems and create a turmoil in the handling of business affairs for once the lien were perfected it would attach thereafter to all property or rights to property whether real or personal, tangible or intangible, whenever acquired, and there could be no dealing with any property at any time with any assurance that the property was not subject to a lien for the Government. For example, let us assume that an automobile dealer handling the sale of several hundred automobiles per year were subject to the Federal tax lien. Presumptively every automobile which he acquired and sold after such lien

was established would be subject to the lien and the right of the Government to take the automobile from an innocent third party and apply it against the tax which was due. Persons financing such automobiles would be subject to this prior lien and their rights imperiled. Many other instances could be cited of grave injustice that would follow from such an interpretation.

To hold in accordance with appellant's contention, however, does no harm to the Government in that it is clear that under the provisions of the law relating to the collection of taxes by distraint and by Court proceedings the Government can reach after-acquired property of a tax debtor by distraint proceedings or Court action at any time that it may choose, while the intervening interests of third persons in such after-acquired property will be protected.

The analogy between the Federal tax lien and a civil judgment is further useful in analyzing the departmental rulings and the cases cited by the Government relating to the removal and release of a tax lien. A satisfaction of a judgment entirely releases any and all rights which a judgment creditor might theretofore have had arising out of the judgment. A release of the lien created under the provisions of R. S. 3186a is without question analogous to such satisfaction of a judgment. Thus a partial release would be the same as a partial satisfaction. A removal of the lien as to specific property would be the same as a release of specific property from an execution. Further, there is no question but what title to property can be quieted as against a judgment lien upon said property without affecting any other rights of the judgment creditor which the judgment may have given rise to.

Conclusion.

It is respectfully submitted that the *Pac. R. R. Company* case is authority for the proposition that the words, "all property" must refer to some time to be ascertained by the context and that this time has been determined by Congress through the amendments which it has enacted to be the time at which the lien is recorded; that the case of *United States v. Long Island Drug Company* is authority for the proposition that the lien of the Government does not attach to after-acquired property except through distraint or Court proceedings and that intervening rights are prior to the rights acquired by the Government through such distraint or Court proceedings; and that the words "all property" as used in R. S., Section 3186a, refer to real and personal property, whether tangible or intangible as distinguished from judgment liens which attach only to real property and not to personal property. and that in the instant case it should be held that the lien of the Government sought to be asserted herein against after-acquired property did not arise until distraint proceedings were levied in 1940.

Respectfully submitted,

PAUL J. OTTO.

H. ELLIOT POWNALL, JR.,

Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy, of the estate
of Abraham Zemansky, David Zemansky and Sol Zemansky,
doing business under the fictitious names and styles of Prov-
ident Loan Association and State Loan Office, Bankrupts,
Appellee.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 391

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED
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United States
Circuit Court of Appeals
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SAM KLEINMAN,

Appellant,

vs.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court in and for
the Southern District of California
Central Division

No. 34490-H Bkey.

In the Matter of

ABRAHAM ZEMANSKY, DAVID ZEMANSKY
and SOLOMON ZEMANSKY, doing business
under the fictitious names and styles of PROV-
IDENT LOAN ASSOCIATION and STATE
LOAN OFFICE,

Debtor.

PETITION FOR ARRANGEMENTS UNDER
CHAPTER ELEVEN OF THE FEDERAL
BANKRUPTCY ACT

To: The Honorable Judges of the District Court of
the Southern District of California:

The petition of Abraham Zemansky and David Zemansky and Solomon Zemansky, commonly referred to as Zemansky Bros., transacting business as co-partners under the fictitious name and style of Provident Loan Association, and also transacting business under the fictitious name and style of State Loan Office, respectfully shows:

I.

That petitioners are residents of the County of Los Angeles and State of California, in said District, and for more than one (1) year last past have carried on their business in said City of Los An-

geles, County of Los Angeles and State of California in said District, as follows, to-wit:

The business of the Provident Loan Association at 706 So. Hill Street, Los Angeles City and the business of State Loan Office at 558 So. Main Street, Los Angeles.

II.

Petitioners allege that they are insolvent and are unable to pay their debts as they mature. That no petition in bankruptcy has been filed against or by them. That attached hereto and made a part of this petition is a statement of the affairs [2] of petitioners. That petitioners owe debts which they are unable to pay in the approximate amount of \$1,250,000.00. That they have assets and properties in the approximate amount of \$500,000.00. That there are no executory contracts except two leases; one in favor of the Cutts Estate covering petitioners' principal place of business, at 706 South Hill Street, Los Angeles, Calif., expires in March of 1945, carrying a rental of \$600.00 per month at the present time, and second, a lease expiring March 1, 1940, covering the premises occupied by petitioners at 558 So. Main Street, Los Angeles, Calif., carrying a rental of \$400.00 per month.

III.

That due to the large number of creditors and the extent and nature of the assets of petitioners, which consist largely of jewelry and notes, the preparation of a complete statement of affairs, and the

preparation of a statement of all the debts and the addresses of the creditors and a detail of all of the assets entails a vast amount of detail work.

That it is deemed desirable by petitioners that the within petition be filed forthwith. That an attachment has been levied upon some of the properties belonging to petitioners and petitioners show that they propose to file a full statement of debts and assets and statement of affairs as required by the Act, within a period of three (3) days from the date of the filing of this petition, all of which will be filed under oath as required by the provisions of said Act.

Wherefore your petitioners pray:

First—that they be allowed by this Honorable Court a period of three days from and after the date of the filing of this petition within which to file a full and true statement of all debts, and the names and places of residence of their credi- [3] tors and an accurate inventory of all property of petitioners and a statement of the affairs of said petitioners as required by the provisions of said Act, and

Second—your petitioners pray that proceedings may be had upon this petition in accordance with

the provisions of Chapter 11 of the Act of Congress relating to bankruptcy.

ABRAHAM ZEMANSKY
DAVID ZEMANSKY
SOLOMON ZEMANSKY
BINFORD & BINFORD
By L. B. BINFORD

State of California
County of Los Angeles—ss.

We, Abraham Zemansky, David Zemansky and Solomon Zemansky, the petitioners named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of our knowledge, information and belief.

ABRAHAM ZEMANSKY
DAVID ZEMANSKY
SOLOMON ZEMANSKY

Subscribed and sworn to before me this 10th day of July, 1939.

[Seal]

V. I. MacMAHON

Notary Public in and for said
County and State

The petition may be filed and three days time is allowed debtor within which to file schedules and list of creditors.

WM. P. JAMES
Dist. Judge.

[Endorsed]: Filed Jul. 10, 1939. [4]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

The above named debtors having heretofore filed a Petition for Arrangements under Section 322 of Chapter Eleven of the Federal Bankruptcy Act, and having failed to offer any arrangements or plan of settlement with their creditors, and due notice to the debtor, the creditors and other persons as directed by the Court having been duly given and hearing held pursuant thereto on the 31st day of October, 1939, at the hour of two o'clock P. M., and it appearing that the debtors should be adjudged bankrupt and bankruptcy proceeded with,

Now, Therefore, At Los Angeles in said District on this 31st day of October, 1939, it is hereby Ordered and Adjudged that Solomon Zemansky, Abraham Zemansky and David Zemansky, sometimes transacting business under the fictitious name and style of Provident Loan Association and also sometimes transacting business under the fictitious name and style of State Loan Office, and Zemansky Brothers, a co-partnership composed of Solomon Zemansky, Abraham Zemansky and David Zemansky, be and they hereby are jointly adjudged bankrupts within the true intent and meaning of the Acts of Congress relating to bankruptcy.

Done at Los Angeles in said District on this said 31st day of October, 1939.

ERNEST R. UTLEY

Referee

[Endorsed] : Filed Jul. 17, 1942. [5]

[Title of District Court and Cause.]

PROOF OF CLAIM OF SAM KLEINMAN

At the City and County of San Francisco, in the Northern District of California, on the 14 day of February, 1940, A. D., came Sam Kleinman, of the City of Los Angeles, in the County of Los Angeles, in the above-entitled District of California, and made oath and says that Abraham Zemansky, Solomon Zemansky and David Zemansky, doing business under the fictitious firm names and styles of Provident Loan Association, State Loan Office and Zemansky Brothers, a co-partnership, the persons who heretofore filed a petition for composition and against whom an adjudication of bankruptcy has been filed, were at and before the filing of said petition, and still are, justly and truly indebted to said deponent in the sum of One Hundred Twenty-seven Thousand, Five Hundred One and 61/100 (\$127,501.61) Dollars, composed as follows:

One Hundred Twenty-six Thousand, Four Hundred One and 61/100 (\$126,401.61) Dollars, secured, as hereinafter provided;

Three Hundred Seventy (\$370.00) Dollars, unsecured;

Seven Hundred Fifty (\$750.00) Dollars, unsecured, for which a priority is claimed, as hereinafter set forth. [10]

First: One Hundred Twenty-six Thousand, Four Hundred One and 61/100 (\$126,401.61) Dollars; that the consideration for said debt is as follows: Lawful

money of the United States of America, loaned to the above-named bankrupts by your deponent, at the times and in the amounts hereafter shown, and evidenced by promissory notes aggregating One Hundred Eighty Two Thousand, Four Hundred Eighty (\$182,480.00) Dollars, upon which no judgments have been rendered, together with the interest allowed by said notes, computed from the dates of said notes, in the amounts hereinafter shown, and together with costs and reasonable attorney's fees, provided for in said notes and contracts, hereinafter described, and which reasonable attorney's fees your deponent estimates to be in the amount hereinafter set forth; that contemporaneously with the delivery and negotiation of said promissory notes, in the manner, amounts and on the dates hereinafter set forth, the aforesaid bankrupts entered into and executed contracts under and by virtue of the terms, conditions, covenants and agreements of which, the payment of the aforesaid promissory notes were secured by said debtors; that copies of said promissory notes and said contracts are hereto attached, and by reference thereto are made a part hereof, except that said agreement of February 24th, 1939 pertained to and contained copies of twenty (20) identical notes, of which a copy is thereto annexed, and said agreement of March 2nd, 1939, contained and pertained to five (5) identical promissory notes of Five Thousand (\$5,000.00) Dollars each, of which a copy is thereto annexed; that the dates of said respective promis-

sory notes and contracts and the amount of the obligation and the amount secured by and the due dates of said notes are as follows:

Date of Notes and Contracts 1939		Amount	Due 1939	
February	24	\$100,000.00	February	29
			[11]	
March	2	\$ 25,920.00	Demand	
	22	2,510.00	March	27
	28	2,000.00	April	2
	31	2,200.00	April	4
April	5	2,000.00	April	10
	3	2,500.00	April	8
	8	2,000.00	April	13
	11	2,200.00	April	16
	13	2,100.00	April	18
	15	2,200.00	April	20
	18	2,500.00	April	23
	21	2,000.00	April	26
	24	1,500.00	April	29
	28	2,500.00	May	3
May	2	1,200.00	May	7
	9	3,700.00	May	14
	13	2,000.00	May	18
	25	3,400.00	May	30
June	2	3,750.00	June	7
	7	3,400.00	June	12
	23	3,900.00	June	28
	28	4,600.00	July	3
July	5	2,400.00	July	10
		<hr/>		
Total		\$182,480.00		
		<hr/>		

That as provided for in said notes and contracts, notes bear interest from the date and in the percentage therein respectively provided; that the amount of interest upon said notes to the date hereof is in

the sum of Eight Thousand Fifty One and 61/100 (\$8,051.61) Dollars, computed as follows:

Interest due to July 11, 1939, the date of the filing by the bankrupts of their petition for reorganization.....	[12] \$1,490.42
Interest due from July 11, 1939, to November 21, 1939, the date of adjudication of bankruptcy	4,002.93
Interest due from November 21, 1939, to February 14, 1940, the date of execution of this proof of claim.....	2,558.26
Total.....	<hr/> \$8,051.61

That your deponent is informed and believes, and on such information and belief alleges, that a further period of time will elapse before he realizes upon his security, hereinbefore set forth; that interest will be due at that time in an amount unknown to your deponent, but your deponent asks that the said additional interest be computed at said time and included in this claim.

That it is provided in said respective notes and contracts that in the event it be necessary for your deponent to retain and hire attorneys for the collection of said obligation, that he should be entitled to costs and reasonable attorney's fees; that your deponent has been compelled to obtain legal services for the collection of said notes and contracts; that your deponent is informed and believes, and upon information and belief alleges, that the sum of Ten Thousand (\$10,000.00) Dollars is a reasonable fee to be paid for the rendering of said attorney's services, heretofore and hereafter to be necessarily re-

quired herein; that deponent asks leave to add the amount of costs when same are determined. That no part of said debt has been paid, except on the following dates and in the following amounts: [13]

March	2, 1939	\$25,920.00
	22, 1939	2,510.00
	28, 1939	2,000.00
	30, 1939	2,200.00
April	4, 1939	4,500.00
	8, 1939	2,000.00
	11, 1939	2,200.00
	13, 1939	2,100.00
	15, 1939	2,200.00
	18, 1939	2,500.00
	21, 1939	2,000.00
	24, 1939	1,500.00
	28, 1939	2,500.00
May	9, 1939	3,700.00
	13, 1939	1,000.00
	25, 1939	3,400.00
June	7, 1939	3,400.00
	23, 1939	3,900.00
	28, 1939	4,600.00
		<hr/>
Total		\$74,130.00

That there are no set-offs or counter-claims to the same; and that the only security held by this deponent for said debts are the said notes and contracts and the pledge tickets, properties and rights therein granted or secured by the terms, covenants and conditions in said contracts, hereinbefore more fully described which, as hereinbefore provided, are annexed hereto.

That the value of said security has not been determined; that when a determination of the same is made and when the said security is realized and

paid to your deponent, pursuant to said notes and contracts, that your deponent receive upon any balance of his claim that may be unsecured, if any there be, a dividend, and have the same rights as an unsecured creditor in regard thereto. [14]

That the originals of the aforesaid notes and contracts are not attached hereto, for the purpose of safety and safe-keeping, but that the same are available and will be exhibited at all proper times and to all proper persons.

That nothing hereinbefore is intended to, nor shall the same be deemed to be a waiver of any security or rights created by, or to which the deponent is entitled under, the terms and conditions of the notes and contracted attached hereto.

Second: Three Hundred Fifty (\$350.00) Dollars; that the consideration for said debt is money loaned to the above-named bankrupts by deponent and evidenced by an IOU attached hereto and made a part hereof by this reference thereto; that no judgment has been rendered thereon, and that no part of said debt has been paid, and that there are no set-offs or counter-claims to the same, and that deponent has not, nor has any person by his order or to his knowledge or belief, for his use had or received any manner of security for said debt whatsoever.

Third: Seven Hundred Fifty (\$750.00) Dollars; that the consideration for said debt is services rendered by deponent as an employee of the above-

named bankrupts, for which services deponent earned wages and commissions in an amount upon which he is informed and believes, and upon information and belief alleges, is in the above-named sum of Seven Hundred Fifty (\$750.00) Dollars; that said wages and commissions were earned and the services therefor performed by deponent, as a salesman and clerk employed by said bankrupts within three (3) months prior to the filing of the petition by the aforesaid bankrupts, and that a preference and priority as a labor claim is asserted and demanded therefor, over and prior to the payment of other claims except of the same class, as provided for and set forth in the Bankruptcy Act; that no judgment has [15] been rendered thereon, and that no part of said debt has been paid, and that there are no set-offs or counter-claims to the same, and that deponent has not, nor has any person by his order or to his knowledge or belief, for his use had or received any manner of security for said debt whatsoever.

SAM KLEINMAN

Creditor.

Subscribed and sworn to before me this 15th day of February, A. D., 1940.

[Seal]

MARY A. LAPACHET

Notary Public in and for said
County and State.

My Commission Expires July 3, 1941. [16]

LETTER OF ATTORNEY

To Eugene L. Wolver, Theodore A. Horn and
Edward B. Dienstag:

I, Sam Kleinman, the claimant mentioned in the foregoing claim, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other place and time as may be appointed by the Court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof, may be held, and then and there from time to time, and as often as there may be occasion, for said claimant and in his name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to Bankruptcy; and in the choice of trustee or trustees of the estate of the said Bankrupt, and for said claimants to assent to such appointment of trustees; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said Bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due said claimants under any composition, and for any other

purpose in said claimants' interest whatsoever, with full power of substitution.

In Witness Whereof, the undersigned has hereunto set his hand and seal for and on behalf of said claimants the 14 day of February, 1940.

SAM KLEINMAN

Subscribed and sworn to before me this 15th day of February, 1940.

[Seal]

MARY A. LAPACHET

Notary Public in and for the
County of San Francisco,
State of California.

My Commission Expires July 3, 1941. [17]

[Title of District Court and Cause.]

OBJECTIONS TO CLAIM OF SAM KLEINMAN, OBJECTIONS TO RIGHT OF SECURITY THEREUNDER AND SET-OFFS TO SAID CLAIM.

Comes now Paul W. Sampsell, the duly appointed, qualified and acting Trustee in the above entitled estate, and files herewith his objections to the claim of Sam Kleinman, objections to right of security thereunder, and set-off to said claim filed herein in the amount of \$127,501.61, of which \$750.00 is claimed as a preferred labor claim, and the balance

as a secured claim, and as and for his grounds of objection alleges:

I.

That no part of the said claim is entitled to priority of payment as a labor claim.

II.

That the said claim is unsecured and the said claimant does not have or hold and is not entitled to any security in connection with the said claim, and is not entitled to any claim, lien, charge or security upon any property or assets of the bankrupt, or of third persons, as security for the said claim by virtue of any alleged transfer, assignment, pledge or hypothecation of any property or assets of the bankrupt or third persons for the reason that all of the said property and assets have at all times remained in the possession and under the control of the [248] bankrupt. Your Trustee further alleges that there are no valid, legal or binding transfers or assignments to the said claimant of any property or assets of the bankrupt, accounts receivable or pledge obligations receivable, and alleges that the said property has at all times remained under the exclusive possession and control of the bankrupt.

Your Trustee further alleges that any act or attempt by the bankrupt to rehypothecate, assign or pledge any contracts held by it as pledgee in its business as pawnbroker is void and illegal and contrary to the provisions of the laws of the State of

California, and in connection with any claim for security made by the said claimant, your Trustee alleges that the bankrupt had possession and control of the said property claimed by the claimant to be held as security, and your Trustee so has possession and control thereof, and that the Referee has sole and exclusive jurisdiction herein to determine the nature, extent and amount of the claim of the said claimant as filed herein, and of the set-off thereto, and of the claim of security therefore, and your Trustee further alleges that the said claimant should be required to show what right, title and interest, if any, either as to ownership or as security which claimant has, claims or maintains upon and in connection with the said property, assets, effects, pledges and pledge contracts held and in the possession of your Trustee herein, and your Trustee alleges that the said claimant should be required to show herein why the same should not be considered as assets of this bankrupt estate and free and clear of any claim of ownership or of security in and to claimant. [249]

V.

Your Trustee alleges that on the 24th day of February, 1939, the bankrupt executed an agreement with Sam Kleinman, the claimant, by the terms of which the parties recited that they were desirous of having the then account owing to the said Kleinman, by the bankrupt secured by way of pledge and that the bankrupt was desirous of pledging pawn tickets held by the bankrupt as pawn broker pledgee

to secure the said twenty notes, and by the terms of the said agreement, in addition to making and delivering of the said notes, the bankrupt agreed to transfer and deposit by way of pledge with Sam Kleinman as collateral security for the payment of said notes certain pledge agreements and pawn tickets as set forth in Exhibit "A" attached to the said agreement, and pursuant to the said agreement the said bankrupt executed and delivered to the claimant twenty \$5,000.00 notes evidencing the account of the claimant at that time in the amount of \$100,000.00. That said pledge agreement, pledged property and pawn tickets, however, at all times remained in the possession and under the control of the bankrupt, and by said agreement second party attempted to constitute the bankrupt as its agent for the purpose of collecting money under the said pledges to be held by the bankrupt for the [255] purpose of applying the same upon demand of the said Sam Kleinman as payment under the said promissory notes. Said agreement further provided that the bankrupt was to retain in its possession the article pledged and pawned.

That subsequent thereto and on the dates as set forth hereinafter, the bankrupt and the said Sam Kleinman entered into a series of agreements bearing dates as set forth hereinafter, all the said agreements being in the same form and terms, which said agreements were intended to be evidence of a por-

tion of the said \$100,000.00 obligation (Twenty \$5,000.00 notes) to wit:

1939	March	2.....	25,920.00	
	"	22.....	2,510.00	
	"	28.....	2,000.00	
	"	31.....	2,200.00	
	April	5.....	2,000.00	
	"	3.....	2,500.00	
	"	8.....	2,000.00	
	"	11.....	2,200.00	
	"	13.....	2,100.00	
	"	15.....	2,200.00	
	"	18.....	2,500.00	
	"	21.....	2,000.00	
	"	24.....	1,500.00	
	"	28.....	2,500.00	
	May	9.....	3,700.00	
	"	13.....	1,000.00	
	"	25.....	3,400.00	
	June	2.....	3,750.00	
	"	23.....	3,900.00	
	"	28.....	4,600.00	\$74,130.00

The above amount of \$74,130.00, together with the additional amounts as set forth hereinafter in Paragraph VI, makes the total of the claim of Sam Kleinman as filed herein in the amount of \$127,-501.61.

By the terms of said agreements the bankrupt agreed to transfer and deposit by way of pledge with Sam Kleinman as collateral security for the same new promissory notes, the certain pledge agreements, pledged property and pawn tickets identified and numbered in accordance with an Exhibit "A" attached to each said contract, which said pledge agreements and pledged property [256]

and pawn tickets were in the possession of the bankrupt, and by the terms of which agreement the bankrupt attempted to appoint and constitute the said Sam Kleinman or his attorney as its agent to sell the whole or any part of the said pawn tickets at the designation of the said Sam Kleinman, proceeds to be applied upon the said promissory note, in the said agreements referred to. By the said agreement the said Sam Kleinman attempted to appoint the bankrupt as his agent to collect the sums of money owing upon the said pawn tickets and pledge agreements, the said bankrupt to hold the same in trust for the purpose of applying such money so collected to the payment of the said promissory notes.

Contemporaneously with each of the said agreements last above referred to, the said Sam Kleinman executed a "Receipt of Pledge" whereby he set forth that he received the said pledge agreements, pledged property and pawn tickets as referred to in each of the said separate contracts. Your Trustee alleges however, that the said receipt was fictitious, the said pledge agreements, pawn tickets and pledged property remaining at all times in the possession of the bankrupt and contemporaneously therewith a further "Receipt" was executed by the bankrupts whereby the bankrupts acknowledged that they had received from the said Sam Kleinman "temporary custody" of the said pledge agreements involved in each separate contract. Your Trustee alleges that the said receipt was fictitious in that there was no change of possession at any

time of the said pledge agreements or pledge property, and that the said pledges, pledged property and pawn tickets thereunder at all times remained under the sole and exclusive possession of the said bankrupt. Your Trustee alleges that when the pledges were redeemed by the customers of the bankrupt or funds were received thereon, that the said funds were used by the bankrupts in their business as pawnbroker. Your Trustee further alleges that the said funds were not placed in any trust account but went into and became a [257] part of the general funds of the bankrupt. Your Trustee alleges that the pledgors and customers of the bankrupt were never notified and had no knowledge of the alleged assignment or transactions with the said Sam Kleinman as set forth herein, and the said Sam Kleinman had no right to make collections and did not make collections upon the said pledge accounts, and the said Sam Kleinman made no objection to the deposit of said funds in the general account of the bankrupt or to the use thereof by the bankrupt. Your Trustee alleges that while there were certain alleged agreements for assignment and transfer, there was in fact, never at any time a transfer of the said pawn tickets or pledges actually made.

VI.

Your Trustee alleges that at all times as set forth herein and particularly for the period of four months prior to the filing of the within proceedings, the bankrupt was insolvent in this, that the reason-

able and fair value of the assets of the bankrupt was less than the amount of its obligations, and that the said Sam Kleinman knew and had reasonable cause to believe that the said bankrupt was insolvent, and with intent to prefer the said Sam Kleinman over the other creditors of the bankrupt, the said bankrupt, upon receiving payments upon and pay-off of the pledge contracts alleged to have been held by the said Sam Kleinman as security, subsequently, and not contemporaneously therewith, attempted to pledge and assigned to the said Sam Kleinman other and further pawn tickets and pledge contracts with the attempt to secure the then unsecured account owing to the said Sam Kleinman. That the said transfer and assignments so made (if the Referee should determine that the said obligations of the said Sam Kleinman were secured and the pawn tickets and pledge agreements to constitute security) in those instances and upon those dates as set forth hereinabove, where the same would fall within the period of four [258] months prior to the date of this proceeding, constitute preferences and an attempt upon behalf of the bankrupt to give to the said Sam Kleinman further and additional payment and security upon his obligation, and the said attempted transfer and assignment do so prefer the said Sam Kleinman over other creditors, and the said transactions therefore were and constitute preferences within the contemplation of the Acts of Congress relating to Bankruptcy. Your Trustee alleges the said Sam Kleinman knew and had reason-

able cause to believe that he was so preferred over the other creditors herein.

VII.

That the claim of the bankrupt is made up of the above (\$74,130.00) and the following:

	\$ 74,130.00
Balance of said \$5,000.00 notes not exchanged	25,870.00
Claimant alleges that subsequent to Feb. 24, 1939, he advanced the amount of #350.00 evidenced by I. O. U. to the bankrupt, and was entitled to salary in the amount of \$750.00, or a total of.....	1,100.00
Claimant maintains that he advanced further funds to the bankrupt subsequent to Feb. 24, 1939, in the amount of.....	5,950.00
which said advance your Trustee alleges was not made, and that there is no valid claim therefore.	
Claimant claims interest from Feb. 24, 1939, to the date of the filing of the within proceeding in the amount of.....	10,451.61
Claimant claims the amount of.....	10,000.00
attorney fees. Your Trustee alleges that there was no consideration therefor and that the same is not a proper claim or charge herein.	

Total amount of claim as asserted by claimant..\$127,501.61

VIII.

Your Trustee therefore alleges that the said claim of the claimant should be held and determined herein as unsecured.

Your Trustee alleges that your Trustee should be entitled to set-offs against the said claim of the claimant herein in the following amounts to wit:

Attorneys fees claimed, which your Trustee alleges are not allowable and that there is no consideration therefor.....\$ 10,000.00

Your Trustee alleges that there were no advances or further consideration given by the claimant to the bankrupt subsequent to Feb. 24, 1939, and that the said alleged additional advance as claimed in the claim should be disallowed in the amount of..... 5,950.00

Wherefore, your Trustee prays that his objections be heard herein; that the claim of the claimant herein be held and determined to be unsecured, and that the claimant have no right, title, interest, lien or security in and to the pledges and pledge contracts and pledged property claimed by it, and that the same be determined to be the property and asset of the bankrupt estate; * * * . Your Trustee further prays that in the event the Referee determines that the assignment, transfer or hypothecation of the pawn tickets and pledge agreements were valid and constituted security, that the claims of preference as asserted by the Trustee in Paragraph V hereinabove, be determined by the Referee.

PAUL W. SAMPSELL,

Trustee

F. C. WELLER and

HUBERT F. LAUGHARN

MURRAY M. CHOTINER

By HUBERT F. LAUGHARN

Attorneys for Trustees [260]

(Duly Verified.)

[Endorsed]: Filed May 23, 1940. [261]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The objections of the trustee-in-bankruptcy came on regularly for hearing before the Honorable Benno M. Brink, referee-in-bankruptcy, after successive continuances, on the 21st day of August, 1940 at 10:00 o'clock A.M., Murray M. Chotiner, Frank C. Weller and Hubert F. Laugharn, appearing as attorneys for Paul W. Sampsell, trustee of the within bankrupts, Edward Dienstag, Eugene L. Wolver, Louis Miller and Theodore A. Horn, appearing as attorneys for Sam Kleinman.

The Court, after hearing the evidence and argument of counsel and being fully advised in the premises, and the matter having been submitted for determination, make findings of fact and conclusions of law as follows:

FINDINGS OF FACT

That the bankrupts for some time past, and at the time of the filing of the above entitled bankruptcy proceedings, were engaged in the business of pawn brokers. The Bankrupts operated a place of business known as the "State Loan Office," located at 558 South Main Street, and a place of business known as the "Provident Loan Association," located at 706 South Hill Street, Los Angeles.

That in the operation of the pawnbroking business the following procedure was used whenever a loan was made to a customer: [262] a pawn ticket

which contained a general description of the merchandise was given to the customer. The stub contained a detailed description and was kept as a part of the records of the bankrupts. The jewelry which had been pledged by the customer was placed in an envelope and kept in a drawer in the vault.

The above entitled bankruptcy proceedings were commenced July 10, 1939. The bankrupts, as co-partners and as individuals, at that time and for at least a year prior thereto, were insolvent.

At all times before and since Sam Kleinman became a creditor of the bankrupts there were other creditors of the bankrupts in existence and were in existence at the time of the commencement of the bankruptcy proceedings.

Sam Kleinman first started loaning money to the bankrupts in 1927. The rate of interest was twelve (12) per cent and security was not given to him. The bankrupts repaid the money to Sam Kleinman in 1929. In 1933 Sam Kleinman resumed loaning money to the bankrupts. The rate of interest was twelve (12) per cent and security was not given to him. The creditor became associated with the Provident Loan Association in 1935 for the purpose of selling jewelry received by the bankrupts by virtue of foreclosure of pledges. The money received from the sale of the jewelry went into the operation of the bankrupts' business. Sam Kleinman received a salary and a commission for his services. When he was not busy disposing of jewelry he assisted as a loan clerk at the Provident Loan Association. A loan clerk is one who waits on customers and makes loans

to people who wish to pledge jewelry or other property. During the year prior to the bankruptcy proceedings, the amount of jewelry delivered to the claimant by the bankrupts for re-sale was diminished considerably by the bankrupts for the reason that there was not as much jewelry on hand for sale. On January 1, 1939, Sam Kleinman volunteered to take a reduction in salary, knowing there was not enough work for him to do, and because he was having trouble [263] with his health and because he desired a vacation on account of such illness. During his employment at the Provident Loan Association he had access to and was familiar with the cash drawer where the money was kept for the purpose of making loans to customers. He knew that in 1936 and 1937 there was sufficient funds to make loans. After that time he knew there was not sufficient money to make all loans requested by customers. On many occasions Sam Kleinman told the bankrupts and their employees there was not enough money to make loans and asked them to obtain the necessary funds. On many of these occasions the bankrupts did not provide the necessary funds. He also knew many large loans were refused because the bankrupts were short of capital, and that many loans to customers were not made because of the lack of funds.

In the early part of January, 1939, Sam Kleinman demanded security for his loan. His son-in-law, Edward Dienstag, an attorney, negotiated with the bankrupts for security. The bankrupts first informed him that they were unable to give the

pledges as security as that was not permitted under the law. Mr. Dienstag claimed he had a plan whereby the security could be given.

On or about February 24, 1939, the bankrupts were indebted to Sam Kleinman in the sum of \$99,379.00. The creditor advanced an additional sum of \$621.00 to make the indebtedness an even \$100,000.00.

That on February 24, 1939, and for some time prior thereto and continuously thereafter, Sam Kleinman had reasonable cause to believe and did know that the bankrupts as co-partners and as individuals were insolvent. On February 24, 1939, the bankrupts and Sam Kleinman executed an agreement by the terms of which the parties recited they were desirous of having the account owing to Sam Kleinman secured by way of pledge and that the bankrupts were desirous of pledging pawn tickets held by the bankrupts as a pawnbroker to secure the said indebtedness. The terms of said agreement, in addition to making and delivering notes, provided that the bankrupts agreed to transfer and deposit by way of pledge with Sam Kleinman as collateral security for the payment of said notes, certain pledge agreements and pawn tickets. Pursuant to said agreement the bankrupts executed and delivered to Sam Kleinman twenty (20) \$5,000.00 notes evidencing the account at that time in the amount of \$100,000.00. The Pledge agreements, pledged property and pawn tickets, however, at all times remained in the possession and under the con-

trol of the bankrupts. Sam Kleinman by said agreement attempted to constitute the bankrupts as his agent for the purpose of collecting money under the said pledges. The agreement further provided that the bankrupts were to retain in their possession the articles pledged and pawned in respect to and by virtue of the pawn tickets and to deliver them to the owner thereof, or assignees of said owners, only upon redemptions of said pawn tickets by the payment of the same as provided by Section 3 of the Statutes of California, 1935, page 1613; and after expiration of the time limited by the terms of Paragraph 3 of said Act, the bankrupts should hold any such articles so pledged and pawned for the benefit and to the order of Sam Kleinman.

The bankrupts caused their employees to take drawers of pledges out of the vault at the Provident Loan Association and to total the principal amount of the pledges until they reached a sum in excess of \$100,000.00. The pledges were then placed in separate drawers along-side the other pledges in the vault, and the drawers marked with a "K". The bankrupts and all of their loan clerks had access to the vault and the drawers of pledges. The pawn ticket stubs were placed in a separate book and the initial "K" was placed on the outside of the book. These books of pawn ticket stubs were kept next to the remaining pawn ticket stub books. A duplicate set of pawn ticket stubs were not segregated from the rest of the records of the bankrupts. The bankrupts and their employees had access at [265]

all times to all of the pawn ticket stubs. No attempt was made to prevent the bankrupts or their employees from having access to them.

Whenever a customer wished to redeem a pledge and the particular pledge had been hypothecated with Sam Kleinman, the bankrupts or one of their loan clerks would go to the vault, remove the pledge and return it to the customer. The money received from the customer would be placed in the cash drawer and used again in the business without segregating it in any manner. The moneys received as a result of the redemption of pledges by customers were not placed in any trust account but went into and became a part of the general funds of the bankrupts. Sam Kleinman had full knowledge of this procedure and acquiesced to it. The pledgors and customers of the bankrupts, as well as creditors of the bankrupts, were never notified and had no knowledge of the attempted assignment of contracts to Sam Kleinman. The right to make collections was never given to Sam Kleinman and he did not make collections upon the said pledged account except in the ordinary course of business as an employee of the bankrupts. There never was a transfer of the pawn tickets or pledges. All of the property and assets at all times remained in the exclusive possession and control of the bankrupts. Sam Kleinman did not exercise any dominion or control over the pledges or the pledge ticket stubs except as an employee of the bankrupts. The bankrupts at all times had exclusive dominion and con-

trol of them. There was not any difference in the handling of the pledges or pledge ticket stubs after they were allegedly assigned to Sam Kleinman for security than there was before that time. That the attempted transfer of the pledges and pledge ticket stubs from the bankrupts to Sam Kleinman was a fiction, as no actual transfer ever took place. That the transaction between the bankrupts and Sam Kleinman was an attempt to give Sam Kleinman a more favorable position over other [266] creditors.

The said Sam Kleinman was supplied daily with a list of the pledges which had been redeemed.

On February 27, 1939, an attachment was levied against the bankrupts' business by another creditor. Sam Kleinman and Edward Dienstag were notified of the event and they participated in a conference with the attorney for the attaching creditor for the purpose of releasing the attachment. Arrangements were made to hypothecate certain pledges held by the bankrupts with the attaching creditor in order to release the attachment. Sam Kleinman permitted the bankrupts to use pledges which had been hypothecated to him for the purpose of making up the "security" for the attaching creditor. On the same day new pledges belonging to the bankrupts were set aside in the same manner as before for Sam Kleinman, to replace those which had been used for the attaching creditor.

At irregular intervals, ranging from a few days to a week, new notes and new contracts would be executed between the parties and new pledges would

be set aside in the same manner as was done previously. These covered redemptions made by the bankrupts' customers, pledges used for other creditors and new loans in the amount of \$8,350.00. They were not executed at the time the pledges were redeemed by the bankrupts' customers, or when the pledges were removed or money loaned, except as hereinbefore set forth with respect to the aforesaid attachment. The bankrupts and Sam Kleinman entered into a series of agreements bearing dates as set forth hereafter, all the said agreements being substantially in the same form and terms which said agreements were intended to be evidence of a portion of said \$100,000.00 obligation, together with new and additional sums advanced by the claimant to the bankrupts, totalling \$8,350.00:

1939 March 2.....\$25,920.00

[267]

“	22.....	2,510.00
“	28.....	2,000.00
“	31.....	2,200.00
April	5.....	2,000.00
“	3.....	2,500.00
“	8.....	2,000.00
“	11.....	2,200.00
“	13.....	2,100.00
“	15.....	2,200.00
“	18.....	2,500.00
“	21.....	2,000.00
“	24.....	1,500.00
“	28.....	2,500.00
May	2.....	1,200.00
“	9.....	3,700.00
“	13.....	2,000.00
“	25.....	3,400.00

June	2.....	3,750.00
“	7.....	3,400.00
“	23.....	3,900.00
“	28.....	4,800.00
July	5.....	2,400.00

That the note and agreement dated July 5, 1939, in the sum of \$2,400.00 was for payment of interest.

Whenever new notes and contracts were executed by and between the bankrupts and Sam Kleinman a check for the same amount as the note would be executed by Sam Kleinman's daughter, Jeanette Dienstag. This check was delivered to the bankrupts. When the check was cashed by the bankrupts the money was then returned to Sam Kleinman and re-deposited in Jeanette Dienstag's account. An employee of the bank inquired what the purpose was in following that procedure, and subsequently, the checks issued by Jeanette Dienstag were for an amount less than the note and the difference was written on the note as having been paid in cash. The foregoing method was a subterfuge, as the sums of money indicated were not actually paid to the bankrupts. [268]

That subsequent to February 24, 1939, Sam Kleinman advanced additional principal sums of money to the bankrupts, making a principal total of \$108,350.00. That in addition thereto, there was a balance owing to Sam Kleinman by the bankrupts on account of I.O.U.'s in the sum of \$350.00. That there was no agreement to pay interest on the said I.O.U. accounts. That at the time of the filing of the within proceedings the bankrupts were indebted to

Sam Kleinman in the sum of \$661.19, as the balance of interest due the creditor. That the bankrupts were also indebted to Sam Kleinman for commission on account of sales of jewelry in the sum of \$358.31, of which \$75.81 was earned within three months prior to July 10, 1939. That Sam Kleinman was indebted to the bankrupts in the amount of \$100.00, evidenced by I.O.U.'s signed by Sam Kleinman and in the possession of the bankrupts, in which amount the bankrupts are entitled to a credit. * * *

That the following is a recapitulation of the account between the bankrupts and Sam Kleinman

Principal	\$108,350.00	
Balance of interest from February 24 to July 10, 1939.....	661.19	
Balance of principal on account of I. O. U.'s.....	350.00	
Commission on account of sales of jewelry, as a general claim	282.50	
	<hr/>	
Total general unsecured claim.....		\$109,643.69
		[269]
Amount of usurious interest, to which trustee is entitled as an off-set.....		\$24,321.01
		<hr/>
		85,322.68
Less credit of Sam Kleinman's I. O. U. held by bankrupts.....		100.00
		<hr/>
		\$85,222.68
That in addition Sam Kleinman is entitled to priority of payment as a labor claim in the sum of.....		\$ 75.81

CONCLUSIONS OF LAW

I.

That the alleged assignment of pledge tickets and pledges from the bankrupts to Sam Kleinman was void as against creditors of the bankrupts and as against the trustee-in-bankruptcy.

II.

That Sam Kleinman has a general unsecured claim in the sum of \$85,222.68, and a prior labor claim in the sum of \$75.81.

Dated this 17 day of January, 1941.

BENNO M. BRINK,

Referee-in-Bankruptcy.

Approved as to form

EUGENE L. WOLVER,

EDWARD DIENSTAG,

LOUIS MILLER,

By THEODORE A. HORN,

Attorneys for Claimant.

[Endorsed]: Filed Jan. 28, 1941. [270]

In the District Court of the United States
Southern District of California
Central Division
In Bankruptcy No. 34490-H

In the matter of ABRAHAM ZEMANSKY,
DAVID ZEMANSKY and SOL ZEMANSKY,
doing business under the fictitious names and
styles of PROVIDENT LOAN ASSOCIA-
TION and STATE LOAN OFFICE,
Bankrupts.

ORDER AND DECREE

The Objections of the Trustee in Bankruptcy in this matter came on regularly for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy, after successive continuances, on the 21st day of August, 1940, at 10 o'clock A.M., Murray M. Chotiner, Frank C. Weller, and Hubert F. Laugharn appearing as attorneys for Paul W. Sampsell, Trustee in this matter, and Edward Dienstag, Eugene L. Wolver, Louis Miller and Theodore A. Horn, appearing as attorneys for claimant, Sam Kleinman.

The Court, after hearing the evidence and argument of counsel and being fully advised in the premises, and the matter having been submitted for determination, and the Court having filed its Findings of Fact and Conclusions of Law herein;

It Is Hereby Ordered, Adjudged and Decreed that the alleged assignment of pledge tickets and pledges from the bankrupts to Sam Kleinman as

security was and is void as against creditors of the bankrupts and as against the said Trustee-in-Bankruptcy, and

It Is Further Ordered, Adjudged and Decreed that the claim of Sam Kleinman filed herein, be, and the same is hereby allowed as a general unsecured claim in the sum of \$85,222.68, and as a prior labor claim in the sum of \$75.81.

Dated this 17th day of January 1941.

BENNO M. BRINK,

Referee-in-Bankruptcy.

Approved as to form.

EUGENE L. WOLVER,

EDWARD DIENSTAG,

LOUIS MILLER and

THEODORE A. HORN.

By THEODORE A. HORN,

Attorneys for Claimant.

[Endorsed]: Filed Feb. 28, 1941. [271]

[Title of District Court and Cause.]

PETITION FOR REVIEW
OF REFEREE'S ORDER

To the Honorable Benno M. Brink, Esq., Referee
in Bankruptcy:

The petition of Sam Kleinman respectfully shows
as follows:

I.

That your petitioner heretofore duly filed his
Proof of Claim in the above-entitled matter, where-

in it was set forth that the bankrupts herein were indebted to your petitioner in the sum of One Hundred Twenty-six Thousand Four Hundred Twenty-one and 61/100 (\$126,421.61) Dollars, which sum was secured by pledge; the sum of Three Hundred Fifty (\$350.00) Dollars unsecured; and the sum of Seven Hundred Fifty (\$750.00) Dollars unsecured, for which a priority was claimed as a labor claim.

II.

That on or about the 24th day of May, 1940, Paul W. Sampsell, the Trustee in Bankruptcy herein, filed a petition in the above-entitled matter, entitled "Objections to Claim of Sam Kleinman, Objections to Right of Security thereunder, and Set-Offs to said Claim". That in said petition the said Trustee in Bankruptcy prayed that the claim of your petitioner be determined to be unsecured and that said claim be allowed and reduced as a general claim to the sum of Fifty Nine Thousand Twenty-four and 87/100 [272] (\$59,024.87) Dollars.

III.

That upon the filing of said Objections by the said Trustee in Bankruptcy, an Order was duly made and entered by the Honorable Ernest R. Utley, Referee in Bankruptcy, setting for hearing the claims of your petitioner and the Objections thereto, in the courtroom of the Honorable Benno Brink, Referee in Bankruptcy, on the 5th day of June, 1940.

IV.

That the hearing of said claims and objections was thereafter continued to the 21st day of August, 1940, when the same came on regularly for determination, the said claimant, appearing in person and by his counsel, Eugene L. Wolver, Louis Miller, Edward B. Dienstag and Theodore A. Horn, and the Trustee in Bankruptcy appearing in person and by his counsel, F. C. Weller, Hubert F. Laugharn and Murraray M. Chotiner.

V.

That evidence, both oral and documentary, was introduced at said hearing; that the matter was thereafter submitted to the above-entitled Court, and on the 17th day of January, 1941, said Referee Benno Brink did make, enter and file in the records of the above-entitled matter his Findings of Fact and Conclusions of Law, and an Order and Decree thereon.

VI.

That said Order and Decree, for which review herein is sought, is as follows, to-wit: [273]

VII.

That said Order and Decree was and is erroneous for the following reasons:

1. That the evidence adduced at said hearing was insufficient to justify the said Order and Decree;
2. That said Order and Decree are against the law;

3. That there was no evidence in support of the following Findings of Fact, upon which the said Order and Decree is based:

(a) That on February 24, 1939, and for some time prior thereto, and continuously thereafter, Sam Kleinman had reasonable cause to believe, and did know, that the bankrupts, as co-partners, and as individuals, were insolvent. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (a) attached hereto and made a part hereof.)

(b) The pledge agreements, pledge property and pawn tickets remained in the possession and under the control of the bankrupts. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (b) attached hereto and made a part hereof.)

(c) The money received from the customer would be placed in the cash drawer and used again in the business of the bankrupts, without segregating it in any manner. (That the evidence is [275] wholly contrary to said Finding, and is summarized in Exhibit 1 (c) attached hereto and made a part hereof.)

(d) The moneys received as a result of the redemption of pledges by customers became a part of the general funds of the bankrupts, and that Sam Kleinman had full knowledge of this procedure and acquiesced to it. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (d) attached hereto and made a part hereof.)

(e) There never was a transfer of the pawn tickets or pledges, and that all of the property and assets at all times remained in the exclusive possession and control of the bankrupts, and that Sam Kleinman did not exercise any dominion or control over the pledges or the pledge ticket stubs, except as an employee of the bankrupts. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (e) attached hereto and made a part hereof.)

(f) That the bankrupts at all times had exclusive dominion and control of the pledge ticket stubs and pledges, and that there was not any difference in the handling of the pledges or pledge tickets after they were assigned to Sam Kleinman for security than there was before that time. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (f) attached hereto and made a part hereof.)

(g) That the transfer of the pledges and pledge ticket stubs from the bankrupts to Sam Kleinman was a fiction, and that no actual transfer ever took place. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (g) attached hereto and made a part hereof.)

(h) That the transaction between the bankrupts and Sam Kleinman was an attempt to give Sam Kleinman a more favorable position over other creditors. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (h) attached [276] hereto and made a part hereof.)

(i) That the checks executed by Sam Kleinman's daughter, Jeanette Dienstag, and delivered to the bankrupts in respect to new notes and contracts, was a subterfuge. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (i) attached hereto and made a part hereof.)

(n) That the bankrupts, as co-partners and as individuals, on July 10th, 1939, and for at least a year prior thereto, were insolvent. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (n) attached hereto and made [277] a part hereof.)

(o) That during the year prior to the bankruptcy proceedings, the amount of jewelry delivered to the claimant by the bankrupts for resale was diminished considerably by the bankrupts, for the reason that there was not as much jewelry on hand for sale. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (o) attached hereto and made a part hereof.)

(p) That the claimant knew that in 1936 and in 1937 there was sufficient money to make loans, and that after that time he knew there was not sufficient money to make all loans requested by customers; and that he also knew that many large loans were refused because the bankrupts were short of capital. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (p) attached hereto and made a part hereof.)

(q) That a duplicate set of pawn ticket stubs

were not segregated from the rest of the records of the bankrupts. (That the evidence is wholly contrary to said Finding, and is summarized in Exhibit 1 (q) attached hereto and made a part hereof.)

4. That the Court erred in making the following Conclusions of Law:

(a) That the assignment of pledge tickets and pledges from the bankrupts to Sam Kleinman was void as against creditors of the bankrupts, and as against the Trustee in Bankruptcy;

(b) That Sam Kleinman has a general unsecured claim in the sum of Eighty Five Thousand Two Hundred Twenty-two and 68/100 (\$85,222.68) Dollars. [278]

5. The Court erred in admitting in evidence Trustee's Exhibits 3, 14, 17 and 18, over the objections of the claimant, and all testimony based thereon.

6. The Court erred in denying the motion of the claimant, Sam Kleinman, to dismiss the Order to Show Cause issued upon the objections of the Trustee in Bankruptcy to the proof of claim of said claimant. (R. T. 511, 11. 5-13).

Wherefore: Your petitioner prays for a review of the said Order and Decree by the above-entitled

Court, and that the said Order and Decree be vacated and set aside.

SAM KLEINMAN

Petitioner.

EUGENE L. WOLVER,

LOUIS MILLER,

EDWARD B. DIENSTAG and

THEODORE A. HORN

By: EDWARD DIENSTAG

Attorneys for Petitioner.

[279]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW BY SAM KLEINMAN

To the Honorable Judges of the Above Entitled
Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of this Court, do hereby certify to the following:

Sam Kleinman, a creditor in this matter, has filed his petition for review from an order made by your Referee in this matter on January 17, 1941, in which he sustained certain objections which had been made by the Trustee herein to the claim filed in this matter by the said petitioner on review, who will hereafter be referred to as "Kleinman."

THE PROCEEDINGS

This bankruptcy matter began as a Chapter XI proceeding but later an order of adjudication was made and bankruptcy is now being proceeded with. The case is pending before Referee Ernest R. Utley but the matter involved in this review was heard and determined by your Referee.

The bankrupts were pawnbrokers and as such carried on an extensive business in the City of Los Angeles. To finance their operations they borrowed large sums of money from various individuals, including Kleinman, to whom at the time of bankruptcy they were indebted in the approximate sum of \$108,000.00. Practically all of the obligations of the bankrupts to the aforesaid individuals from whom they borrowed money were unsecured. [333]

Kleinman began loaning money to the bankrupts in 1927 and from 1933 on they were continuously indebted to him. From 1935 on Kleinman was associated with or employed by the bankrupts on a salary and commission basis for the purpose of selling jewelry which had been pledged with the bankrupts but which had not been redeemed. From time to time Kleinman also assisted as a loan clerk in one of the places of business maintained by the bankrupts.

Up to 1939 Kleinman had no security for any of the money loaned by him to the bankrupts. However, in January of that year he requested that he be given security for the amount owing

to him which then approximated \$100,000.00 and which was evidenced by certain promissory notes which had been executed from time to time by the bankrupts in favor of Kleinman. Negotiations followed and on February 24, 1939, new notes, aggregating \$100,000.00, were executed by the bankrupts in favor of Kleinman and at the same time an agreement in writing was entered into between the parties which provided, among other things; (1) That the bankrupts agreed to "transfer and deposit, by way of pledge with said second party as collateral security for the payment of said twenty (20) promissory notes, the pledge agreements and pawn tickets, the numbers of which are contained in Exhibit A attached hereto and made a part hereof, which are now in the possession of the first parties. (the bankrupts);" (2) That Kleinman appointed the bankrupts as agent "for the purpose of collecting any and all sums of money which may be due, owing, or unpaid upon and in respect to each of the said pawn tickets, and pledge agreements, and first parties (the bankrupts) do hereby agree to collect such moneys and hold the same in trust for the purpose of applying such money so collected to the payment of the twenty (20) promissory notes hereinbefore described, and first parties will, upon demand, so pay and apply said moneys to the payment of the said promissory notes;" and (3) That the bankrupts agreed "to retain in their possession every article pledged [334] and pawned to them in respect to

and by virtue of the foregoing pawn tickets, and to deliver them to the owners thereof, or assignees of said owners, only upon redemption of said pawn tickets by the payment of the same as provided in Section 3 of Statutes of California, 1935, Page 1613; and after the expiration of time limited by the terms of said Paragraph 3 of said Act, first parties shall hold any such articles so pledged and pawned for the benefit of and to the order of second party.”

In connection with the aforesaid agreement Kleinman acknowledged in writing the receipt from the bankrupts of the pledge agreements and pawn tickets therein described. (Kleinman's Exhibit No. 4.) At the same time the bankrupts acknowledged in writing the receipt of the said agreements and pawn tickets from Kleinman. (Trustee's Exhibit No. 4.)

Thereafter, and from time to time, agreements similar in character to the one of February 24, 1939, were executed by the bankrupts and Kleinman to cover new notes given by the bankrupts to Kleinman for collections made by the bankrupts on the aforesaid pledge agreements and pawn tickets, for certain of the said pledge agreements and pawn tickets which were released by Kleinman and for new money loaned by Kleinman to the bankrupts in the sum of *of* \$8,350.00. The new notes which were given for the collections made by the bankrupts and for the pledge agreements and pawn tickets released by Kleinman reduced

correspondingly the notes already held by Kleinman.

This bankruptcy proceeding commenced with the filing of a Chapter XI petition on July 10, 1939. At that time all or substantially all of the pledge agreements and pawn tickets covered by the then outstanding agreements between the bankrupts and Kleinman were in possession of the bankrupts as were also all of the articles which had been pledged and pawned to the bankrupts with respect to the said pawn tickets. A receiver being appointed he took possession [335] of the said pledge agreements and pawn tickets and the said articles so pledged and they, or the proceeds thereof, are now in the possession of the Trustee in Bankruptcy awaiting the outcome of this litigation.

After the adjudication in bankruptcy in this matter Kleinman filed his claim for \$126,401.61 as principal, interest, and attorneys' fees on the notes he then held under the aforesaid agreements and for an unsecured item of \$370.00 and for a prior labor claim of \$750.00. Attached to the claim were copies of the then outstanding agreements between the bankrupts and Kleinman. It was alleged in the said claim that the aforesaid item of \$126,401.61 was secured by the aforesaid agreements and the pledge tickets, properties and rights therein granted or secured by the terms, covenants and conditions in said agreements.

In due course the Trustee herein filed his objections to the said claim in which he alleged, among

other things, (1) that the said claim was wholly unsecured for the reason that all of the property and assets claimed by the said Kleinman as security remained at all times in the possession and control of the bankrupts; (2) that any attempt by the bankrupts to assign to Kleinman any contracts held by them in their business as pawnbroker was illegal and contrary to the laws of the State of California; (3) that the agreements with Kleinman, which were within four months of the commencement of this proceeding on July 10, 1939, were preferential and void under the Bankruptcy Act; * * *

After due hearing your Referee, on January 17, 1941, made his order in which, in substance, he ruled that Kleinman's claim was wholly unsecured. * * * [336] It is from this order that this review is taken.

THE QUESTIONS PRESENTED

In his petition for review Kleinman makes these contentions:

1. That the evidence is insufficient to justify your Referee's order.
2. That your Referee's order is against the law.
3. That there was no evidence in support of those portions of your Referee's findings of fact which are detailed in subparagraph 3 of paragraph VII on Pages 3 to 7 of the petition for review.

4. That your Referee erred in those portions of his conclusions of law which are detailed in subparagraph 4 of paragraph VII on page 7 of the petition for review.

5. That your Referee erred in admitting in evidence the exhibits and the testimony mentioned in subparagraph 5 of paragraph VII on page 8 of the petition for review.

6. That your Referee erred in denying Kleinman's motion to dismiss the objections filed by the Trustee to his claim at the conclusion of the Trustee's case.

Kleinman's contentions as above set forth present briefly these questions for determination:

On the Question of Kleinman's Security

(a) Was there an actual delivery and an actual change of possession from the bankrupts to Kleinman of the pledge agreements and pawn tickets here involved or of the articles which had been pledged to the bankrupts in respect thereto?

(b) Were the agreements between Kleinman and the bankrupts valid as against the Trustee in Bankruptcy and the [337] creditors of the bankrupts without an actual delivery and an actual change of possession from the bankrupts to Kleinman of the pledge agreements and pawn tickets or of the articles which had been pledged to the bankrupts in respect thereto?

The Evidence

The evidence on the questions presented by this review is contained in a complete transcript of the proceedings and in the exhibits in the case, all of which are going up with this certificate.

Referee's Findings of Fact

Your Referee's findings of fact on the questions presented by this review are contained in the document captioned "Findings of Fact and Conclusions of Law which is going up with this certificate. For the information of the Court your Referee is also sending up with this certificate the Trustee's proposed findings of fact, Kleinman's proposed amendments thereto, and the [338] Trustee's reply to said proposed amendments, all of which were duly considered by your Referee in deciding upon the findings of fact and conclusions of law which he finally signed in this matter.

Your Referee's findings on the questions of fact presented by this review as set forth in his afore-said findings of fact and conclusions of law may be thus briefly set forth:

On the Question of Kleinman's Security .

(a) Your Referee found that there was no actual delivery and no actual change of possession from the bankrupts to Kleinman of the pledge agreements and pawn tickets here involved or of the articles which had been pledged to the bankrupts in respect thereto. [339]

Referee's Conclusions of Law

Your Referee's conclusions of law on the questions presented by this review are contained in the aforesaid instrument captioned Findings of Fact and Conclusions of Law which is going up with this certificate. Briefly stated, your Referee's conclusions were:

On the Question of Kleinman's Security

(a) Your Referee concluded that the agreements between the bankrupts and Kleinman were void as against the Trustee in bankruptcy and the creditors of the bankrupts and that, therefore, Kleinman's claim was wholly unsecured.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Objections to claim of Sam Kleinman, filed May 23, 1940.
2. Reporter's transcript of testimony and proceedings adduced at hearing on objections by Trustee to claim of Sam Kleinman, Volumes I, II and III. [340]

3. The following Exhibits:

Trustee's Exhibit No. 1—(By reference) Objections of trustee to claim of Sam Kleinman, page 8, line 25 to page 9, line 11.

Trustee's Exhibit No. 2—(By reference) Objections of trustee to claim of Sam Kleinman, page 11 line 26 to page 12, line 11.

Trustee's Exhibit No. 3—(By reference)

Objections of trustee to claim of Sam Kleinman, page 2, line 28 to page 4, line 32.

Trustee's Exhibit No. 4—Agreement dated February 24, 1939.

Trustee's Exhibit No. 5—Contract dated March 2, 1939. (by reference)

Trustee's Exhibit No. 6—Contract dated March 22, 1939. (by reference)

Trustee's Exhibit No. 7—Debtor's Schedules and Amendments. (by reference)

Trustee's Exhibit No. 8—Pledge Ticket.

Trustee's Exhibit No. 9—Pledge Bag.

Trustee's Exhibit No. 10-A—Photograph of Vault.

Trustee's Exhibit No. 10-B—Photograph of Vault.

Trustee's Exhibit No. 10-C—Photograph of Vault.

Trustee's Exhibit No. 10-D—Photograph of Vault.

Trustee's Exhibit No. 11—Tabs dated July 5 and 6, 1939.

Trustee's Exhibit No. 12—Promissory notes with signatures cut out.

Trustee's Exhibit No. 13—Promissory notes with signatures cut out.

Trustee's Exhibit No. 14—Schedule of interest accrued.

Trustee's Exhibit No. 15—Cancelled check for \$800.00.

Trustee's Exhibit No. 16—Cancelled check for \$500.00.

Trustee's Exhibit No. 17—List of interest checks.

Trustee's Exhibit No. 18—Interest payment checks.

Kleinman's Exhibit No. 1—Pawn ticket.

Kleinman's Exhibit No. 2—I. O. U. dated June 8, 1939.

Kleinman's Exhibit No. 3—Memo. of Redemptions.

Kleinman's Exhibit No. 4—Copy of contract of of February 24, 1939. [341]

Kleinman's Exhibit No. 5—Ledger Sheet.

Kleinman's Exhibit No. 6—Book of pledges.

Kleinman's Exhibit No. 7—Inventory Sheet.

Kleinman's Exhibit No. 8—Five pages of pledge numbers.

4. Trustee's proposed findings of fact and conclusions of law.
5. Kleinman's proposed amendments to proposed findings of fact and conclusions of law.
6. Trustee's reply to Kleinman's proposed amendments to findings of fact and conclusions of law.
7. Findings of fact and conclusions of law dated January 17, 1941.
8. Order and decree, dated January 17, 1941.
9. Petition for review of Referee's order, filed February 13, 1941.

Respectfully Submitted this 27th day of February, 1941.

BENNO M. BRINK

Referee in Bankruptcy.

[Endorsed]: Filed Feb. 28, 1941. [342]

[Title of District Court and Cause.]

Memorandum of Conclusions,
of
Judge Hollzer

February 6, 1942

This proceeding comes before the court upon a review prosecuted by one Sam Kleinman, hereinafter referred to as claimant, from an order of the Referee disallowing the claim filed herein by the former as a secured claim but approving the same as an unsecured claim in the amount of \$85,222.68 and as a prior labor claim in the sum of \$75.81.

The record upon which this review has been presented is exceedingly voluminous, covering not only many hundreds of pages of the reporter's transcript, but also including numerous exhibits. The questions requiring determination have been briefed at great length, and in addition, more than two days have been devoted to oral argument by able and experienced counsel. The great industry and exhaustive research thereby demonstrated merit commendation.

While the interested parties no doubt may feel that the points presented call for an opinion commensurate in length with that of the voluminous briefs, nevertheless, the demands made upon our time by other pending proceedings will not warrant the same.

The facts as found by the Referee are in substance as follows:

At the time of the filing of these bankruptcy proceedings and for many years prior thereto, the bankrupts were [375] engaged in business as pawnbrokers. Originally they operated a single establishment known as "State Loan Office", and subsequently they maintained a second establishment under the name of "Provident Loan Association".

In the operation of their pawnbroking business the procedure followed in making a loan was in effect that a pawn ticket, containing a general description of the article pawned, was given to the borrower. A stub containing a detailed description of the pawned article was kept as a part of the records of the bankrupts. The jewelry, which usually constituted the pawned article, was placed in an envelope and kept in a drawer in one of the vaults belonging to the bankrupts.

Claimant started loaning money to the bankrupts about 1927, upon interest at the rate of 12% per annum, but without security. By 1929, all sums loaned by him to the bankrupts up to that time had been repaid. In 1933, he resumed loaning money

to them, and again no security was given. From time to time thereafter, and up to the Spring and Summer of 1939, he continued to loan to them various sums. At first the interest on these loans was fixed at 12% per annum. However, in 1936 the interest was specified at 10% per annum, and in 1938 further loans were made at the rate of 7%.

By July 1, 1936 these loans totalled \$50,000 and were evidenced by ten notes bearing that date, each in the principal sum of \$5,000 with interest at 10% per annum, and payable one day after date. On November 14, 1936 claimant loaned to the bankrupts the additional sum of \$20,000, the same being evidenced by a note for that amount payable in 30 days. A further loan was made by him on March 25, 1938 [376] in the amount of \$19,000, for which a note was given payable one day after date. On July 26 of the same year he loaned to the bankrupts \$5,000 additional, as evidenced by two notes, one for \$3,000 payable on demand, and the other for \$2,000 payable in 30 days. Again on December 17, 1938 he extended to them an additional loan of \$1700, for which he received a note payable one day after date. All notes executed during 1938 bore interest at the rate of 7% per annum.

In addition, the bankrupts borrowed from claimant from time to time between 1934 and February 1939, various sums of money *raning* from \$100 to \$15,000 at any one time, but each of these loans was evidenced by an IOU, without any interest being specified thereon.

None of these loans was secured.

In 1935 the bankrupts employed claimant at their establishment known as Provident Loan Association. He continued in that employment up to the date of bankruptcy. Originally his duties consisted of selling unredeemed jewelry. The monies received from such sales went into the operation of the bankrupts' business. Subsequently his duties included that of a loan clerk, namely lending money to the bankrupts' customers who pledged jewelry or other property as security for the repayment of such loans. From the time he entered such employment and up to about the end of 1938 claimant was paid a salary of \$75.00 per week plus a commission of 1% upon the merchandise sold by him. Thereafter, he accepted a reduction in salary, knowing there was not enough work for him to do, he also stating that he was in poor health and desired a vacation.

By 1938 the volume of merchandise on hand for sale had decreased materially. In that year and also during 1939 his duties were divided between the two jobs of selling merchandise [377] and serving as a loan clerk. At the Provident Loan Association he had access to and was familiar with the cash drawer where the money was kept for the purpose of making loans to customers. In 1936 and 1937 he knew that there were sufficient funds to make loans. He also knew that in 1938 and the following year there was not sufficient money to

make all loans requested by the customers. During the latter period he told the bankrupts and their employees that there was not enough money to make loans and asked them to obtain the necessary funds. On many of these occasions the bankrupts did not provide the necessary funds. He further knew that many large loans were refused because the bankrupts were short of capital, and that many loans to customers were not made because of the lack of funds.

At all times before and since claimant became a creditor of the bankrupts, the latter were indebted to other creditors, and there continued to be such creditors up to and at the time of the commencement of these bankruptcy proceedings.

About January, 1939 (claimant asserts it was in December, 1938) claimant demanded from the bankrupts security for the above mentioned loans. His son-in-law, an attorney negotiated with them for security. Originally he requested that pawned articles then held by the bankrupts in pledge be given for security. They informed him they were unable to do so as that was not permitted under the law. Claimant's attorney informed them he had a plan whereby the security could be given.

On or about February 24, 1939 the bankrupts were indebted to claimant in the sum of \$99,379.00. About the same date he advanced to them an additional amount of \$621.00. On the date mentioned, the bankrupts and claimant executed an agreement

which in effect declared, among other provisions, [378] that they were desirous of having this indebtedness secured by way of pledge, and that to secure the same the bankrupts were desirous of pledging pawn tickets held by them as pawnbrokers. Said contract, in addition to providing for the making and delivery of certain notes, also stipulated in effect that the bankrupts agreed to transfer and deposit by way of pledge with claimant as collateral security for the payment of said notes certain pledge agreements and pawn tickets. Claimant by said contract attempted to constitute the bankrupts his agents for the purpose of collecting money under said pledges. Said contract further provided that the bankrupts were to retain in their possession the articles pledged and pawned in respect to and by virtue of the pawn tickets, and to deliver them to the owner thereof or assignees of said owners only upon redemption of said pawn tickets by the payment of the same as provided by Section 3 of the Statutes of California, 1935, page 1613; and further that after the expiration of the time limited by the terms of Paragraph 3 of said Act, the bankrupts should hold any such articles so pledged and pawned for the benefit and to the order of claimant. Pursuant to said contract of February 24, 1939 the bankrupts executed and delivered to claimant twenty notes, each in the principal amount of \$5,000.

The bankrupts caused their employees to take

drawers of pledges out of the vault at the Provident Loan Association, and to total the principal amount of the pledges until they reached a sum in excess of \$100,000. The pledges (approximately 1200 in number) were then placed in separate drawers alongside the other pledges in the vault, and these drawers were marked with a "K". The bankrupts and all of their loan clerks had access to the vault and the drawers containing the pledges. The pawn ticket stubs were placed in a [379] separate book and the initial "K" was placed on the outside of the book. These books of pawn ticket stubs were kept next to the remaining pawn ticket stub books. The bankrupts and their employees at all times had access to all of the pawn ticket stubs. No attempt was made to prevent them from having such access.

Whenever a customer wished to redeem a pledge, including any pledge which had been hypothecated with claimant, the bankrupts or one of their loan clerks would go to the vault, remove the pledge and return it to the customer. Claimant had full knowledge of this procedure and acquiesced in it. The pledgors and customers of the bankrupts, as well as creditors of the bankrupts, were never notified and had no knowledge of the attempted assignment to claimant. The right to make collections was never given to him, and he did not make collections upon said pledged accounts, except in the ordinary course of business as an employee of the bankrupts. He was supplied daily with a list of the pledges

which had been redeemed. On February 27, 1939 an attachment was levied against the bankrupts' business by another creditor. Claimant and his attorney were notified of the event, and they participated in a conference with the attorney for the attaching creditor for the purpose of releasing the attachment. Arrangements were made to hypothecate certain pledges, held by the bankrupts, with the attaching creditor in order to release the attachment. Claimant permitted the bankrupts to use pledges which the parties had undertaken to hypothecate to him, in order to make up the security for the attaching creditor. On the same day new pledges belonging to the bankrupt were set aside in the same manner as previously for claimant, to replace those which had been [380] used for the attaching creditor.

Thereafter at irregular intervals, ranging from a few days to a week, new notes and new contracts would be executed between the bankrupts and claimant, and new pledges would be set aside in the same manner as had been done previously. These covered redemptions made by the bankrupts' customers, pledges used for other creditors and new loans in the amount of \$8,350.00. They were not executed at the time the pledges were redeemed by the bankrupts' customers, or when the pledges were removed or money loaned, except as previously set forth with respect to the aforesaid attachment. Between March 3, and July 5, 1939, the bankrupts and

claimant entered into a series of agreements bearing dates as set forth hereafter, all said agreements being substantially in the same form and terms, and which were intended to be evidence of a portion of said indebtedness of \$100,000, together with new and additional sums advanced by claimant to them, totalling \$8,350.00, as follows, to-wit:

1939	March	2.....	\$25,920.00
	March	22.....	2,510.00
	“	31.....	2,200.00
	April	5.....	2,000.00
	“	3.....	2,500.00
	“	8.....	2,000.00
	“	11.....	2,200.00
	“	13.....	2,100.00
	“	15.....	2,200.00
	“	18.....	2,500.00
	“	21.....	2,000.00
	“	24.....	1,500.00
	“	28.....	2,500.00
	May	2.....	1,200.00
	“	9.....	3,700.00
	“	13.....	2,000.00
	“	25.....	3,400.00
	June	2.....	3,750.00
	“	7.....	3,400.00
	“	23.....	3,900.00
	“	28.....	4,800.00
	July	5.....	2,400.00

[381]

The note and agreement made under date of July 5, 1939 involved the payment of interest in the amount of \$2400.00. Whenever new notes and contracts were executed between the parties a check for the same amount as the note would be executed by claimant's daughter and delivered to the bank-

rupts. When the check was cashed by the bankrupts the money was then returned to claimant and re-deposited in his daughter's account. An employee of the bank inquired what the purpose was in following that procedure, and subsequently the checks issued by claimant's daughter were for an amount less than the note and the difference would be written on the note as having been paid in cash. The foregoing method was a subterfuge as the sums of money indicated were not actually paid to the bankrupts. All notes executed on and after February 24, 1939 stipulated for interest at the rate of 10% per annum.

These bankruptcy proceedings were commenced July 10, 1939. The bankrupts as co-partners and as individuals at that time and for at least a year prior thereto were insolvent. At the time said proceedings were commenced they were indebted to claimant in the sum of \$661.19 on account of interest, also in the further amount of \$358.31 as commission on account of sales of jewelry, in addition to the principal sums hereinbefore stated. Of this latter amount the sum of \$75.81 had been earned within three months prior to July 10, 1939. Likewise, on the latter date, claimant was indebted to the bankrupts in the amount of \$100 as evidenced by IOU's he had signed and delivered to them.

While in their opening brief counsel for claimant have set forth five specific findings of the Referee dealing with the subject matter of security, and

also have therein [382] called attention to two additional specific findings, the latter dealing with the subject matter of a preference, and likewise have therein specified three further findings, the latter dealing with the subject matter of usury, all of which they contend are not supported by the evidence, or are contrary to the great weight of the evidence, no attack is made in said brief upon the findings embodying the facts hereinbefore recited.

In addition to the foregoing, the referee also found:

“There never was a transfer of the pawn tickets or pledges, all of the property and assets at all times remaining in the exclusive possession or control of the bankrupts * * * that the attempted transfer of the pledges and pledge ticket stubs from the bankrupts to Sam Kleinman was a fiction as no actual transfer ever took place.”

“Sam Kleinman did not exercise any dominion or control over the pledges or pledge ticket stubs, except as an employee of the bankrupts. * * * The bankrupts at all times had exclusive dominion and control of them. * * * There was not any difference in the handling of the pledges or pledge ticket stubs after they were allegedly assigned to Kleinman for security than there was before that time.”

“The money received from the customer would be placed in the cash drawer and used

again in the business, without segregating it in any manner, * * * The monies received as a result of the redemptions of pledges by customers were not placed [383] in any trust account but went into and became a part of the general funds of the bankrupts.”

“The pledge tickets, pledge property and pawn tickets, however, at all times remained in the possession and under the control of the bankrupts.”

“A duplicate set of pawn ticket stubs were not segregated from the rest of the records of the bankrupts.”

“That the transaction between the bankrupts and Sam Kleinman was an attempt to give Sam Kleinman a more favorable position over other creditors.”

“That on February 24, 1939, and for some time prior thereto, and continuously thereafter, Sam Kleinman had reasonable cause to believe and did know that the bankrupts, as co-partners and as individuals, were insolvent.” [384]

Counsel for claimant concede that the rule of law governing the review of the findings of a Referee will be found in certain decisions of our Ninth Circuit Court of Appeals, more particularly, in the cases of *Ott v. Thurston*, 76 F. (2d) 368 and *Weinstein Bros. v. Laugharn*, 84 F. (2d) 419. In the

first of the two cases cited, the Court quoted with approval the following statement:

“It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decision of a referee, based upon his conclusions on questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court.” (citing cases).

In the other case cited the court declared it to be “the familiar rule that where facts are litigated before the referee, and where the witnesses have appeared before him, and a decision upon the controverted facts had been made by him, the court will not ordinarily be justified in reversing the finding of the referee as to the controverted facts.” (citing cases).

[385]

Supplementing their discussion of the findings attacked in their opening brief, particularly in reply to the arguments presented in the brief filed on behalf of the trustee, counsel for claimant assert:

“The statement of facts as set forth by the trustee *presents the evidence only in the light most favorable to the trustee and ignores qualifications and modifications thereof brought out on subsequent examination of the witnesses.* (emphasis ours) The statement of facts as presented is incomplete and one-sided, and in

a considerable number of material instances is contrary to and is not founded upon the evidence adduced at the hearing of the matter.”

The foregoing quotation we think fairly epitomizes the arguments advanced on behalf of claimant in support of their contention to the effect that the findings of the referee are not sustained by the evidence in the particulars hereinbefore set forth.

Most of the evidence consists of testimony given by the various witnesses, some produced on behalf of claimant, and others called on behalf of the trustee in bankruptcy. To a very considerable extent the referee was called upon to resolve conflicts in the testimony of some of the witnesses. In other instances he was required to pass upon seeming contradictions in the testimony given at different times by the same witness. In addition, it was necessary for him to determine what inferences were reasonably warranted in the light of such evidence as he found to be true. In all of these instances he was naturally passing upon the credibility of the witnesses. [386]

Our appraisal of the record, including the facts and circumstances heretofore outlined, also keeping in mind the knowledge, or at least equivalent notice, which one, occupying the advantageous position which for nearly four years claimant enjoyed, may reasonably be presumed to have had, and also the inferences which may properly be drawn from the evidence, convinces us that the most that can

be fairly urged in support of claimant's attack upon the sufficiency of the findings would be to say that the referee would have been justified either in finding the facts to be as contended for on behalf of claimant, or in adopting those most favorable to the trustee, so far as they pertain to the issues of security and of preference. Granted that one who had not heard the witnesses, and thus lacked adequate opportunity to judge their credibility, might have been warranted in drawing inferences contrary to those found by the referee, nevertheless, we are persuaded that the rule announced in the previously cited cases, decided by our Ninth Circuit Court of Appeals, requires us to sustain the findings pertaining to the two issues last mentioned.

In addition to their attack upon the sufficiency of the evidence to sustain certain specific findings, counsel for claimant have advanced certain legal propositions. These are embraced in the following questions, to-wit:

Did the contract of February 24, 1939, and the subsequent agreements between claimant and the bankrupts, give to the former a secured claim of the character he now seeks to enforce against the estate of the bankrupts?

Did the aforementioned agreements constitute voidable preferences? [387]

Respecting the first of these three questions counsel for claimant in their opening brief have advanced the following points:

“Security.

1. That the agreements between Kleinman and the bankrupts provided for a pledge of choses in action as collateral for the repayment of the loans evidenced by the notes attached to Kleinman’s proof of claim on file herein.

2. That the validity of the foregoing pledge agreements is determined by the law of the State of California.

3. That under the Law of the State of California the pledge agreements are valid and effectively created the security for Kleinman’s loans.

(a) There was no necessity for delivery of the choses in action, to wit, the pawn tickets.

(b) The pawn brokers law of the State of California does not deprive a pawn broker from assigning pawn tickets in pledge as collateral security for his debt.

4. Under the California Law a pledgee is not required to maintain dominion or control over the pledge res when the same consists of choses in action.

5. Assuming that dominion and control are required to be maintained, nevertheless, where the pledgee of choses in action reserves or maintains substantial control over the pledge res the assignment of the [388] pledge and the pledge agreements will be sustained against the trustee in bankruptcy.”

In their closing brief counsel for claimant assert:

“The Trustee has consistently fallen into the error of assuming that the subject of the pledge agreements between Kleinman and the bankrupts was the tangible pawns in the possession of the bankrupts. As we have pointed out, however, in our opening Brief, page 60ff. and as has been maintained at all times herein, the subject and the only subject of the pledge agreements between the parties were the pawn tickets executed by the bankrupts’ customers evidencing their promise to repay loans obtained from the bankrupts. This central distinction must at all times be borne in mind. It is supported by two positive elements:

- (a) The contracts and writings of the parties.
- (b) The acts and interpretation of the parties.”

Accordingly, the following additional points are urged on behalf of claimant:

“1. Change of possession was unnecessary for the reason that the subject of the pledge between Kleinman and the bankrupts was choses in action, the transfer of which was evidenced by writings.

This is supported by:

- (a) The contracts and writings of the parties.
 - (b) The acts and interpretation of the parties and the applicable law.
2. Even if a change of possession of the sub-

ject of the pledge was necessary, there was such a change of possession. [389]

3. The documents themselves as executed by the parties clearly indicate that there was a present assignment of the pawn tickets therein described.

(a) To ascertain intent of the parties to a contract, the court will construe all writings pertaining to the contract and executed by the parties thereto at or about the same time.

(b) The language used by the parties is sufficient to and did create a present executed transfer by way of pledge.

4. Under the law and the facts, the pledged property, to-wit, the pawn tickets were separable, and were separated, from the tangible pawns.

5. It is immaterial to the rights of the parties whether or not the pawnbroker can or cannot assign or deliver possession of the pledges, to-wit, the tangible pawns.

6. Kleinman as the pledgee of the choses in action, reserved and maintained such substantial control over the pledge res as to create a lien valid against the Trustee in bankruptcy.”

Counsel for claimant have cited quite a large number of cases in support of the proposition that a chose in action may be transferred to secure the payment of a note, and that a change of possession of such chose in action is not necessary in order to render the security effective, but that a written assignment thereof is sufficient, and further that the

assignee's control over such security need not be absolute and complete, but may be limited and partial. Many [390] pages of the opening and closing briefs have been devoted to a discussion of this proposition and to an analysis of the supporting cases, and likewise a considerable portion of the oral argument has been directed toward the same point.

Repeatedly we find counsel for claimant insisting, "the basic premise of the trustee in his attack upon the security transaction between the parties is that the subject of the pledge agreements was tangible personal property"; whereas "the contracts of the parties and their acts in respect thereto" show that "this is fundamental error; that the true subject of Kleinman's pledges were the customers' pawn tickets."

Thus it becomes clear that counsel for claimant recognize that no valid pledge of "the tangible pawns in the possession of the bankrupts" could have been given as security for the payment of the notes involved herein, and also that if the contract of February 24, 1939 may fairly be construed as designed to accomplish that very result then it must be held that claimant obtained no secured claim.

Accordingly the question arises:

By admitting that under California law a pawnbroker is prohibited from pledging "tangible pawns" prior to the expiration of the time within which the same may be redeemed, and by contending that "the true subject of Kleinman's pledges were the customers' pawn tickets", does claimant thereby concede

that he asserts no interest in said “tangible pawns”, that he has no right to control the disposition of the same, and that he is not entitled to have the proceeds derived from the sale thereof applied toward the payment of said notes? [391]

In neither of the briefs filed on behalf of claimant have we found an unequivocal, affirmative answer to this question. The oral argument likewise gave no such answer.

Counsel for claimant contend, and properly so, that we must give heed to the intention of the parties; and that in order to ascertain their intention the writings of the parties, their acts and the interpretation which they have placed upon the same, must be taken into consideration. In this connection counsel have quoted certain portions of the contract of February 24, 1939. In addition, counsel in their opening brief have directed attention to fourteen separate and distinct steps which they contend were taken by the parties upon the execution of the aforementioned contract and pursuant thereto. These it is claimed demonstrate clearly and convincingly that “the bankrupts did not have unfettered and uncontrolled dominion over the pledge res”, but that on the contrary “Kleinman maintained close supervision and control over the pawn tickets and the proceeds arising therefrom.”

However, in addition to the excerpts quoted by counsel, as above mentioned, there is still another provision in this contract which has received virtually no consideration either in the briefs or the oral

argument, namely, Paragraph Seventh of said agreement. This provision reads as follows:

“Seventh: First parties do hereby agree to retain in their possession every article pledged and pawned to them in respect to and by virtue of the foregoing pawn tickets, and to deliver them to the owners thereof, or assignees of said owners, only upon redemption of said pawn tickets by the payment of the same as provided in Section 3 of the Statutes of California, 1935, page 1613; and after the [392] expiration of the time limited by the terms of said Paragraph 3 of said Act, first parties shall hold any such articles so pledged and pawned for the benefit of and to the order of second party.”

Examined in the light of the restrictions sought to be imposed by the terms and conditions set forth in the provision last quoted, the acts and conduct of the parties, not merely those referred to in the above mentioned fourteen separate and distinct steps, but also those disclosed by the balance of the evidence, clearly demonstrate that the parties to said contract considered that the “customers’ pawn tickets” as distinguished from the “tangible pawns” that is to say, that these so-called choses in action, if separated from and deprived of the security represented by the “tangible pawns”, had virtually no value. Accordingly, as shown by the evidence, claimant undertook through various devices to effectuate not merely the segregation and identification of some 1200 pawn tickets, but also the segregation and identification of

the corresponding “tangible pawns”, which alone gave these choses in action whatever value they possessed as security for the payment of the notes held by him. All of this was designed to deprive the bankrupts of all real control over such “tangible pawns”, and to transfer the same to claimant, and thereby bring about the surrender, and in effect, the pledge of such “tangible pawns” to the latter.

Obviously claimant never has been willing, and in this proceeding has not offered, to allow the proceeds from the sales of these “tangible pawns” to be disposed of on the basis that he has no lien thereon, and has never acquired any primary claim thereto. [393]

Thus it becomes clear that through the instruments executed by claimant and the bankrupts, and by the acts and conduct of the parties, the former undertook to secure a pledge lien upon the “tangible pawns”, and thereby accomplish indirectly that which the law forbade the bankrupts as pawnbrokers from doing directly.

However, in order to have made this plan legally enforceable, even assuming that the prohibition of the Pawnbroker’s Act could have been disregarded, it still would have been necessary for the bankrupts to have surrendered possession and control over the “tangible pawns”. Such relinquishment of possession and control, as all parties concede, never took place. It follows, therefore, that claimant never acquired a secured claim against the estate of the bankrupts.

We shall now direct our attention to the question

as to whether the contract of February 24, 1939, and the subsequent agreements executed between claimant and the bankrupts, constitute voidable preferences.

As heretofore noted, about December, 1938, or January, 1939, a chain of events was set in motion, leading to the execution, on February 24, 1939, of a contract and other documents by claimant and the bankrupts. According to claimant, through the execution of these documents a radical change in the business relations between the bankrupts and himself took place, and thereby he obtained security for the repayment, not only of the indebtedness then owing to him by the bankrupts, but also of subsequent loans. All parties virtually concede that the execution of these instruments and the conduct of the claimant and the bankrupts relative thereto may be regarded as the cause for the litigation involved in this review. [394]

The claimant would have it appear that this extraordinary change in the relations between the bankrupts and himself resulted from the simple and innocent circumstances that in December, 1938 he told the bankrupts that he desired to leave their employ because of ill health and therefore he must be given security for the repayment of their indebtedness to him. The record, however, discloses other facts and circumstances which lend quite a different color to the events which ultimately took place.

At the time of the commencement of the within proceedings and for approximately one year prior

thereto, the bankrupts had become hopelessly insolvent. About the end of the year 1938 claimant's salary was reduced. For more than three years he had had considerable to do with the sale of merchandise at the bankrupts' Hill Street establishment, and it is reasonable to infer that by the end of the latter year he had become aware that the volume of merchandise being offered for sale had decreased to a rather serious extent.

Even according to claimant's own version, approximately two months had elapsed between the time when he first demanded security and the date when the negotiations were concluded, by the execution of the documents upon which he now relies as the basis for his contention that his claim should be allowed as a secured one. Doubtless virtually any kind of security would have been acceptable to him, just so the value had been adequate. Likewise, it would appear, so far as the record discloses, that the bankrupts did not indicate that they had any particular assets which they could use for the purpose of securing the indebtedness they owed him.

In fact, it was not the bankrupts, but the claimant, who suggested that pledges or pawned articles then held by the [395] former be given as such security. This the bankrupts refused to do, upon the ground that it was prohibited by the laws of California. Furthermore, one may justifiably infer that the claimant regarded the conditions then prevailing to be so alarming as to lead him to seek legal advice, and to bring an attorney (his son-in-law) from San

Francisco to represent him in the negotiations which ultimately led to the execution of said contract of February 24, 1939, and the other documents executed in connection therewith. Furthermore, it would appear that it was claimant's attorney who advised that the objection to the effect that California law, prohibiting a pawnbroker relinquishing articles pawned by him, could be overcome in a manner that would nevertheless place the claimant in control of such pawned articles.

Upon examining this contract of February 24, 1939, we find among its provisions several significant and important disclosures. For example, it is therein admitted that, out of a total of nearly \$100,000 then owing and past due to claimant, more than \$73,000 had been in default for over two years, also that a further indebtedness of \$19,000 had been past due for nearly a year, also that on so small an item as a note for \$2450, not only had the principal been delinquent since 1936, but there also remained unpaid interest thereon amounting to \$486.00, and that, in addition, on two other smaller items, namely, two notes totalling \$620.00, default in the payment of the principal had existed since 1936, and there was past due interest thereon in the sum of \$123.00.

Likewise, it appears that whereas prior to 1939 claimant had been willing to loan to the bankrupts various sums, ranging from \$100.00 to \$15,000 at a time upon their mere IOU's, this practice virtually came to a termination about [396] the time of the execution of the contract on February 24, 1939.

In the light of the facts and conditions hereinbefore outlined, the testimony given on behalf of claimant, whereby he sought to give a simple and innocent explanation for the abrupt and extraordinary change which he undertook to effectuate in his financial relations with the bankrupts—a change which apparently required negotiations extending over a period of a month or longer with the aid of legal counsel—indeed challenges one's credulity.

In the course of an opinion rendered in a case recently decided by the United States Supreme Court, Mr. Justice Frankfurter pointedly observed: "It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of a living trial is lost in the search for error in a dead record."

As previously noted the record upon this review is quite voluminous. It bears the earmarks of a long trial. The lengthy briefs and rather extended oral argument cause one to wonder whether or not "the perspective of the living trial" has been "lost in the search for error in a dead record."

We are persuaded that upon the issue of preference the record justifies the findings of the Referee. We further conclude that the contract of February 24, 1939, and those executed subsequently between the bankrupts and claimant, constitute voidable preferences. [397]

[Endorsed]: Filed Feb. 6, 1942. [401]

[Title of District Court and Cause.]

ORDER OF JUDGE ON PETITION FOR
REVIEW OF REFEREE'S ORDER.

The petition for review of Sam Kleinman filed herein on the 13th day of February, 1941, came on for hearing before Honorable Harry A. Hollzer, Judge Presiding, on the 18th day of July, 1941, and having been concluded on the 22nd day of July, 1941, Messrs. Isaac Pacht, Eugene L. Wolver, Edward Dienstag, Louis Miller and Theodore A. Horn appearing as Attorneys for claimant, Sam Kleinman, and Frank C. Weller and Murray M. Chotiner appearing as Attorneys for Paul W. Sampsell, Trustee herein, and the Court having heard the arguments of counsel for the respective parties, and having considered the evidence and all of the proceedings had before the Referee and the authorities submitted by the respective counsel, and having filed herein its Memorandum of Conclusions dated February 6, 1942, and its Minute Order dated May 20, 1942, and it appearing to be the proper case for such an order;

It Is Hereby Ordered that each and all of the Referee's report, findings and conclusions in this matter be, and the same hereby are approved and adopted, except that portion thereof that finds and adjudges that said claimant received usurious interest, and that such excepted portion of the said report, findings and conclusions of the Referee is hereby rejected and set aside; and [403]

It Is Further Ordered, Adjudged and Decreed that the said claim of Sam Kleinman be, and the same is

hereby allowed as a general unsecured claim in the sum of \$109,545.73 and a prior labor claim in the sum of \$75.81, and that the claims of the trustee of set-offs for alleged usurious interest, are hereby disallowed; and

It Is Further Ordered that this matter be, and the same is hereby remanded to the Referee with instructions to modify his said Order in conformity herewith.

Dated: June 8, 1942.

H. A. HOLLZER

District Judge.

Approved as to Form:

ISAAC PACT, EUGENE L.
WOLVER, EDWARD DIEN-
STAG, LOUIS MILLER and
THEODORE A. HORN

June 3/42.

By ISAAC PACT

Attorneys for Claimant.

[Endorsed]: Filed Jun. 8, 1942. [404]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDER

To Claimant, Sam Kleinman, and

To Isaac Pacht, Eugene L. Wolver, Edward
Dienstag, et al., His Attorneys:

You, and each of you will please take notice that pursuant to the Minute Order entered by Judge Harry A. Hollzer in the above entitled matter on the

20th day of May, 1942, the said Court signed and filed an Order entitled: "Order of Judge on Petition for Review of Referee's Order" under date of June 8, 1942.

Dated June 16, 1942.

FRANK C. WELLER
MURRAY M. CHOTINER

Attorneys for Trustee.

Back cover:

Service of the within Notice of Entry of Order is hereby admitted this 18th day of June, 1942.

EDWARD DIENSTAG, et al.,
By ISAAC PACHT
Attorneys for Sam Kleinman.

[Endorsed]: Filed Jun. 19, 1942. [405]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above Entitled Court and to the Clerk Thereof and to Paul W. Sampsell, Trustee in Bankruptcy in the Above Captioned Matter:

Notice Is Hereby Given that Sam Kleinman, Claimant in the above entitled case, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the whole of the Order of this Court made and entered June 8, 1942, excepting that portion of said Order which rejects and sets aside the report, findings and conclusions of the referee, that said Claimant received usurious interest.

That the amount involved in this appeal and the value of the property affected by the Orders of the said Referee and said District Court, and each of them, is more than Five Hundred (\$500.00) Dollars.

Dated: July 8, 1942.

EDWARD DIENSTAG, THEO-
DORE A. HORN and LOUIS
MILLER

By EDWARD DIENSTAG [406]

Attorneys for Claimant and Appellant. Address:
110 Sutter Street, San Francisco, Calif.

Names and addresses of the Attorneys for the
Appellee,

Paul W. Sampsell,

Trustee of the Estate of the above named
bankrupts are:

Frank C. Weller

817 Board of Trade Building

111 West 7th

Los Angeles, California.

Murray M. Chotiner

508 James Oviatt Building

617 South Olive

Los Angeles, California

[Endorsed]: Filed Jul. 8, 1942. [407]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL, PURSUANT TO RULE 75d, FEDERAL RULES OF CIVIL PROCEDURE.

Now Comes Sam Kleinman, Claimant in the above entitled matter, appellant herein, and pursuant to Rule 75d of the Federal Rules of Civil Procedure, sets forth the statement of the points upon which appellant intends to rely on appeal as follows:

(1) That the evidence does not support that portion of the Order and Decree of the District Court, dated and filed June 8, 1942, which adjudges the claim of the claimant and appellant herein to be an unsecured claim.

(2) That the District Court erred in making that portion of its Order, dated June 8, 1942, adopting and approving the following Findings of Fact of the Referee, for the reason that the same are against the law and not supported by the evidence:

(a) That on February 24, 1939, and for some time prior thereto, and continuously thereafter, Sam Kleinman had reasonable cause to believe, and did know, that the bankrupts, as co-partners, and as individuals, were insolvent.

(b) The pledge agreements, pledge property and pawn tickets remained in the possession and under the control of the bankrupts. [409]

(c) That the money received from the customer would be placed in the cash drawer and

used again in the business of the bankrupts, without segregating it in any manner.

(d) The moneys received as a result of the redemption of pledges by customers became a part of the general funds of the bankrupts, and that Sam Kleinman had full knowledge of this procedure and acquiesced to it.

(e) There never was a transfer of the pawn tickets or pledges, and that all of the property and assets at all times remained in the exclusive possession and control of the bankrupts, and that Sam Kleinman did not exercise any dominion or control over the pledges or the pledge ticket stubs, except as an employee of the bankrupts.

(f) That the bankrupts at all times had exclusive dominion and control of the pledge ticket stubs and pledges, and that there was not any difference in the handling of the pledges or pledge tickets after they were assigned to Sam Kleinman for security than there was before that time.

(g) That the transfer of the pledges and pledge ticket stubs from the bankrupts to Sam Kleinman was a fiction, and that no actual transfer ever took place.

(h) That the transaction between the bankrupts and Sam Kleinman was an attempt to give Sam Kleinman a more favorable position over other creditors.

(i) That the checks executed by Sam Kleinman's daughter, Jeanette Dienstag, and deliv-

ered to the Bankrupts in respect to new notes and contracts, was a [410] subterfuge, as the sums of money indicated were not actually paid to the bankrupts.

(j) That the claimant knew that in 1936 and 1937 there was sufficient money to make loans, and that after that time he knew there was not sufficient money to make all loans requested by customers; and that he also knew that many large loans were refused because the bankrupts were short of capital.

(k) That a duplicate set of pawn ticket stubs were not segregated from the rest of the records of the bankrupts.

(3) That the District Court erred in approving and adopting the following Conclusion of Law of the Referee:

That the assignment of pledge tickets and pledges from the bankrupts to Sam Kleinman was void as against creditors of the bankrupts and as against the Trustee in bankruptcy.

(4) That portion of The Order of The Judge on Petition for Review of Referee's Order dated June 8, 1942, which adjudges and decrees that the claim of Sam Kleinman is a general unsecured claim and not a secured claim, is contrary to the law and is not supported by the evidence.

(5) That the District Court erred in making its order adjudging and decreeing that the said claim of Sam Kleinman is a general unsecured claim (rather than a secured claim).

(6) That the District Court erred in failing to find that the claim of Sam Kleinman was a secured claim in the sum of \$108,350.00, plus interest accrued at the date of the proof of claim, i. e., the 14th day of February, 1940, together with interest at the rate of 10% from and after said 14th day of February, 1940. [411]

(7) That the District Court erred in failing to find that the claimant was entitled to reasonable Attorneys' fees in this matter by virtue of his security agreement.

(8) That the District Court erred in failing to find that the claimant was a general unsecured creditor in the sum of \$574.19.

Dated: July 8, 1942.

EDWARD DIENSTAG, THEODORE A. HORN and LOUIS MILLER.

By EDWARD DIENSTAG,
Attorney for Sam Kleinman,
Claimant and Appellant.

Receipt of a copy of the within Statement of Points is hereby admitted this day of July, 1942.

Attorneys for Paul W. Sampsell, Trustee in Bankruptcy and Appellee.

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF CON-
TENTS OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

Sam Kleinman, the Claimant in the above entitled matter, respectfully requests that the following portions of the record, proceedings and evidence be included and contained in the record on appeal, to-wit:

1. Reporter's Transcript of Testimony and Proceedings Adduced at Hearing of Objections by Trustee to Claim of Sam Kleinman, Volumes I, II and III.

2. Notice of Entry of Order, dated June 16th, 1942.

3. Order of Judge on Petition for Review of Referee's Order, dated June 8th, 1942.

4. Minute Order, Judge Hollzer's Calendar, May 20th, 1942.

5. Minute Order, Judge Hollzer's Calendar, February 6th, 1942.

6. Memorandum of Conclusions, Judge Hollzer, February 6th, 1942.

7. Referee's Certificate on Petition for Review by Sam Kleinman, dated February 27th, 1941.

8. Petition for Review of Referee's Order, filed by the Claimant in the above entitled Court February 13th, 1941. [417]

9. Order and Decree of the Referee in Bankruptcy, dated January 17th, 1941, made after the hearing of the Trustee's Objections to the Claim of Sam Kleinman.

10. Findings of Fact and Conclusions of Law of the Referee in Bankruptcy, dated January 17th, 1941 and made upon determination of the hearing of the Trustee's Objections to the Claim of Sam Kleinman.

11. Trustee's Objections to the Claim of Sam Kleinman, Objections to Right of Security thereunder and Set-offs to said Claim, dated May 23rd, 1940.

12. Proof of Claim of Sam Kleinman, filed in the above entitled matter before the Referee in Bankruptcy on February 16th, 1940.

13. Trustee's Exhibit Number 4, Agreement dated February 24th, 1939.

14. Trustee's Exhibit Number 5, Contract dated March 2nd, 1939.

15. Trustee's Exhibit Number 6, Contract dated March 22nd, 1939.

16. Kleinman's Exhibit Number 1, Pawn Ticket.

17. Kleinman's Exhibit Number 3, Memorandum of Redemptions.

18. Kleinman's Exhibit Number 4, Copy of Contract of February 24th, 1939.

19. Kleinman's Exhibit Number 5, Ledger Sheet.

20. Kleinman's Exhibit Number 6, Book of Pledges.

21. Kleinman's Exhibit Number 7, Inventory Sheet.

22. Kleinman's Exhibit Number 8, Five pages of Pledge Numbers.

23. Reporter's Transcript of Excerpts from Proceedings on Hearing Arguments on Certificate on

Petition of Sam Kleinman for Review of Referee's Order of January 17th, 1941 [418] and dated July 18th, 1941, consisting of pages numbered 1 to 12, inclusive, on file in this action.

24. Reporter's Transcript of Excerpts from Proceedings on Argument on Petition of Sam Kleinman for Review of Referee's Order of January 17th, 1941 and dated July 21st, 1941, consisting of pages numbered 1 to 23, inclusive, on file in this action.

25. Notice of Appeal.

26. Statement of Points upon which Appellant intends to rely on appeal.

27. This designation of Contents of Record on Appeal.

Dated July 8, 1942.

EDWARD DIENSTAG,
THEODORE A. HORN and
LOUIS MILLER.

By EDWARD DIENSTAG,

Attorneys for Sam Kleinman,
Claimant.

Address: 110 Sutter Street,
San Francisco, California.

Received copy of the within Designation by Appellant of Contents of Record on Appeal and service is hereby admitted this day of July, 1942.

Attorneys for Trustee.

[Endorsed]: Filed Jul. 8, 1942. [419]

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION BY AP-
PELLANT OF CONTENTS OF RECORD
ON APPEAL.

To the Clerk of the Above Entitled Court:

Sam Kleinman, the Claimant in the above entitled matter, respectfully requests that the following portions of the record, proceedings and evidence be included and contained in the record on appeal, in addition to the portions of the said record and proceedings heretofore designated by the claimant, to-wit:

A. The Petition in Bankruptcy of the above named bankrupts (not including the schedules).

B. Adjudication of bankruptcy of the above named bankrupts.

C. This Supplemental Designation of Contents of Record on Appeal.

Dated: July 17, 1942.

EDWARD DIENSTAG,
THEODORE A. HORN and
LOUIS MILLER,

By EDWARD DIENSTAG,

Attorneys for Sam Kleinman,
Claimant.

Address 110 Sutter Street,
San Francisco, California.

Copy mailed to attorneys for appellee Jul. 17,
1942.

[Endorsed]: Filed Jul. 18, 1942. [420]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 422, inclusive, contain full, true and correct copies of Petition for Arrangements under Chapter Eleven of the Federal Bankruptcy Act; Adjudication of Bankruptcy; Stipulation filed Aug. 12, 1942; Order filed Aug. 12, 1942; Proof of Claim of Sam Kleinman and Notes and Agreements attached thereto; Objections to Claim of Sam Kleinman, objections to right of security thereunder and set-offs to said claim; Findings of Fact and Conclusions of Law; Order and Decree; Petition for Review of Referee's Order; Referee's Certificate on Petition for Review by Sam Kleinman; Trustee's Exhibit No. 4; Kleinman's Exhibit No. 4; Minute Order of February 6, 1942; Memorandum of Conclusions of February 6, 1942; Minute Order of May 20, 1942; Order of Judge on Petition for Review of Referee's Order; Notice of Entry of Order; Notice of Appeal; Stay Order; Statement of Points upon which Appellant Intends to Rely on Appeal; Cost Bond on Appeal; Stipulation and Order re Original Exhibits; Designation by Appellant of Contents of Record on Appeal; and Supplemental Designation by Appellant of Contents of Record on Appeal, which, together with the Original Kleinman's Exhibits 1, 3, 5, 6, 7 and 8, the Original Reporter's Transcripts

of Excerpts on Hearings on July 18, 1941 and July 21, 1941 and three volumes of copies of Reporter's Transcript of Testimony and Proceedings adduced at Hearing of Objections by Trustee to Claim of Sam Kleinman transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$77.25 which amount has been paid to me by appellant.

Witness my hand and the seal of the said District Court this 31 day of August, A. D. 1942.

[Seal] EDMUND L. SMITH,
 Clerk.
By THEODORE HOCKE,
 Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ADDUCED AT
HEARING OF OBJECTIONS BY TRUS-
TEE TO CLAIM OF SAM KLEINMAN

Appearances:

For the Trustee:

Frank C. Weller, Esq.,
Hubert F. Laugharn, Esq., and
Murray M. Chotiner, Esq.

For the Claimant:

Edward B. Dienstag, Esq.,
Eugène L. Wolver, Esq.,
Theodore A. Horn, Esq., and
Louis Miller, Esq.

Los Angeles, California

August 21st, 22nd, 23rd, 26th, 27th and 28th, 1940.

[1*]

TESTIMONY

The Referee: Is there any dispute on the part of the Trustee that, as to the amount which is here claimed—what is it that is claimed? It is claimed \$127,501.61. Is that amount disputed?

Mr. Chotiner: We are starting with their claim, your Honor, as to the amount claimed by them; in other words, we are not contending that the principal amounts set forth in their claim were never loaned or advanced to Zemansky [18] Broth-

*Page numbering appearing at top of page of original Reporter's Transcript.

ers; so we are starting with that figure. There is no dispute as to the figures set forth as claimed by them in these various agreements that are attached to and made a part of their claim. [19]

The Referee: Now, then, the Trustee claims that after February 24, 1939, the claimant paid to Zemanskys the amount listed at the top of page 9, totaling \$74,130; is that correct?

Mr. Wolver: Those are the amounts that were paid to Kleinman.

Mr. Laugharn: This is the way to put it, I think. That the \$100,000 transaction was again reformed, that is, subsequent thereto, and on the date set forth the bankrupt and the said Sam Kleinman entered into a series of agreements [44] bearing dates as set forth hereinafter. Now, copies of those agreements, I think, are all attached to the claim. All the said agreements being in the same form and terms, which said agreements were intended to be evidence of a portion of the said \$100,000 obligation (20 \$5,000 notes). Now, the total of those figures of substitution is \$74,130. Now, that left out of the \$100,000, of course \$25,870, upon which there was no substitution. Those two figures make the \$100,000. [45]

Mr. Laugharn: Our contention is this, that on February 24, 1939, there was \$100,000 owed by Zemansky Brothers to Sam Kleinman. That is conceded by counsel for Sam Kleinman. Then subsequent to February 24, 1939, new notes and new agreements, as set forth in the schedule, totaling

\$74,130 were substituted, as we term it, and counsel for Sam Kleinman claim Zemansky was entitled to a credit, although it was not a payment by cash; that those agreements and notes totaling \$74,130 were substituted in place of a series of various \$5,000 notes which had been executed on February 24, 1939. [48]

R. D. HOLDREGE

resumes the witness stand.

Mr. Laugharn: There are two matters we would like to bring out as a correction or an amendment to the Trustee's position as put forward before the Court this morning. The items are concerned in the \$5,950 account.

The Referee: Yes.

Mr. Laugharn: Set up in paragraph 7, page 12.

Q. I will ask you, during the noon hour, did you talk to Mr. Young and also go over the record?

A. Yes sir.

Q. And what have you found in connection with this item of \$5,950?

A. Payments were made apparently by Mr. Kleinman.

Q. I want to make sure that you have the thing in mind that I am referring to first. You said there were in the claim three amounts that you could not find any evidence of on the books?

A. That is right.

Q. But you did find evidence of all of the others [60] except those you enumerated?

(Testimony of R. D. Holdrege.)

A. No, those others were not on the books. They were merely new notes that were given.

Q. There are three of them you said you did not find any record of? A. Yes.

Q. During the noon hour you have looked at the books, haven't you? A. Yes sir.

Q. Did you find any record of any of those items? A. Two of them.

Q. Which two?

A. The item of, I think the loan is dated May 2nd, but it does not appear in the cash book until May 8th, \$1200.

Q. You are referring to an entry in the cash book?

A. Yes; this cash book of May 8, 1939. It shows \$1200, Sam Kleinman.

Q. That book you refer to as the cash book is the book in which the receipts of money was entered? A. Or debited.

Q. That is a debit? A. That is a debit.

Q. Of \$1200? A. That is correct.

Q. That is the item that you stated this morning you [61] had no record of being received by the Zemanskys? A. That is correct.

Q. Now, what other items?

A. On May 13th, there is \$1,000 that was received from Sam Kleinman.

Q. That is in the same book, is it?

A. Yes sir. Now, the only other item which I haven't found in the book——

(Testimony of R. D. Holdrege.)

Q. That leaves one item out of those three that made up the \$5,950? A. That is correct.

Q. Does it not? A. Yes sir.

Q. What is that item you haven't been able to find? A. \$3,750, I believe, on June 2nd. [62]

SOL ZEMANSKY

having been first duly sworn, testified as follows:

The Referee: You are Sol Zemansky?

The Witness: That is right

The Referee: Proceed.

Direct Examination

By Mr. Chotiner:

Q. You are one of the bankrupts in this matter, is that correct? A. I am. [67]

Mr. Chotiner: Mr. Zemansky, directing your attention to 1933, did Zemansky Brothers borrow any money from Sam Kleinman?

A. I believe in that period of time we had borrowed some money from him. I am not certain as to the date. [68]

Q. By Mr. Chotiner: Do you know what rate of interest was paid to Mr. Kleinman on the money that he loaned to Zemansky Brothers?

A. I believe it was 12 per cent.

Q. By Mr. Chotiner: Did Mr. Sam Kleinman ever become [69] an employee of the Provident Loan Association?

(Testimony of Sol Zemansky.)

A. Yes, he was an employee.

Q. When was it that he first became employed by the Provident Loan Association, approximately?

A. I think it was around 1935.

Q. What were his duties when he first became an employee?

A. He was to dispose of the merchandise.

Q. You say he was to dispose of the merchandise. Will you tell the Court just what that entailed?

A. That entailed the disposition of the expired pledges, which were turned over to him, and he was employed to sell them.

Q. What was done with the proceeds, that money?

A. It was turned over to the Provident.

Q. To the Provident. What salary did you pay Mr. Kleinman when he was employed by you?

A. \$75 a week, and then he received one per cent on each sale.

Q. During the time that he was employed, did he have any other duties besides selling jewelry that was received as the result of any unredeemed purchase?

A. Originally he did not, but later on he used to assist in the loan department.

Q. When was it that he started to assist in the loan department? [70]

A. Well, I should judge sometime around about 1937, 1936 or '37.

(Testimony of Sol Zemansky.)

Q. Was there any reason as to why he started to assist in the loan department at that time?

A. No particular reason.

Q. Well, was he busily engaged full time in disposing of merchandise?

A. No, he was not fully engaged.

Q. Then, as a matter of fact, Mr. Zemansky, is this true, that he started to assist in the loan department when the disposition of jewelry as a result of unredeemed purchases became rather slack so that was not taking up enough of his time; is that correct?

Mr. Wolver: That is objected to as being leading and suggestive, and assuming facts not in evidence.

The Referee: Overruled.

Q. By Mr. Chotiner: Is that true?

A. Yes.

Q. Now, during 1938 and 1939, was Mr. Kleinman's time devoted mostly to the disposition of jewelry or acting as a loan clerk?

Mr. Wolver: That is objected to, your Honor, he said he assisted in the loan department, and now we have him as a loan clerk.

The Referee: Overruled.

The Witness: What was the question? [71]

(Question read.)

A. It was equally divided.

Q. By Mr. Chotiner: In 1938 and 1939?

A. Yes. [72]

(Testimony of Sol Zemansky.)

Q. And Mr. Kleinman, when he would be busy in making loans there, and acting as a loan clerk, would appraise the jewelry and then go to the cash drawer for the purpose of withdrawing sufficient money in order to make the loan, is that correct?

A. Yes sir.

Q. And were there occasions when there was not sufficient money in the cash drawer to make the loan? A. Yes. [73]

Q. By Mr. Chotiner: Directing your attention to the latter part of 1938 or the 1st of January, 1939, was there any discussion between you and Mr. Kleinman regarding Mr. Kleinman terminating his association with the Provident Loan Association?

A. I believe at one time during that period that he said he wanted to leave. I asked him why and he said——

Q. Was there a conversation in regard to that subject?

A. He said he wanted to go away and rest up, take sort of a vacation for a while. [74]

Q. Did he ask for his money at that time?

A. I believe he said he wanted, if I remember the conversation, he wanted to leave and he desired to have his money secured while he was away.

Q. Did he ask for his money, for payment?

A. I don't recall that.

Q. Mr. Kleinman was up at the Provident Loan Association every day, wasn't he?

(Testimony of Sol Zemansky.)

A. Yes. [75]

A. He said he wanted to leave and he did ask something about his money, but I don't know whether he asked for it, I know it was a conversation about money.

Q. In other words, he did ask for some of the money, is that correct? A. Yes.

Q. What did you tell him then?

A. I told him I was unable to give it to him at the time.

Mr. Wolver: The witness says, "I don't recall the conversation," and counsel follows it with a question which I submit to the Court is an improper question, "He did then ask for some of his money," which question assumes a fact which the witness has not testified to, and by a leading question he elicits the answer "Yes."

The Referee: Overruled. Proceed.

Q. This is at the time when you said, around the first of 1939, or the end of 1938, that there was a discussion regarding Mr. Kleinman leaving the Provident Loan [76] Association.

A. I believe at that time is when he asked if I would secure him for the loan.

Q. When was it that he asked you, if he ever did, for payment of any part of the money that was owing to him?

A. About that same period.

Q. That was the time that this conversation took place which you just related here, is that correct?

(Testimony of Sol Zemansky.)

A. Yes.

Q. What did Mr. Kleinman say to you, if anything, after you told him you could not pay him any money?

A. I believe that was the time he mentioned giving him the loans.

Q. About giving him what? A. The loans.

Q. What do you mean by saying "about giving him the loans"?

A. Turning the loans over to him for the amount of money that we owed him.

Q. By "the loans," you mean loans that had been made to customers who had come into the place, is that right? A. That is correct. [77]

Q. During the several conversations, in which the subject matter was discussed, did Mr. Kleinman also discuss with you the matter of his receiving any payment on account of the obligation?

A. No, I don't believe there was.

Q. Had you discussed with Mr. Kleinman the matter of the money that was owing to the Simons' Lunch Room and Robert J. Gans at any time? [78]

A. I can't recall.

Q. Mr. Zemansky, did you ever talk over your financial condition with Mr. Kleinman, regarding the money that was owing to various creditors?

A. No, I don't believe I did.

Q. Was the subject of the Simons' Lunch Room and the Robert J. Gans matter ever discussed with Mr. Kleinman prior to your giving him the security? A. I can't recall.

(Testimony of Sol Zemansky.)

Q. As a matter of fact, didn't you send Mr. Kleinman over to talk with the Simons people or Robert Gans regarding their accounts?

A. That was after our transaction with Mr. Kleinman.

Q. That was after the security transaction, is that correct? A. That is right.

Q. Was there ever any discussion with Mr. Kleinman prior to the security transaction as to the amount of money that was owing by you?

A. I don't recall.

Q. Well, Mr. Kleinman knew that the Provident Loan Association was short of money insofar as making loans was concerned, didn't he?

Mr. Wolver: That is objected to as calling for the conclusion of the witness.

The Referee: Overruled. [79]

A. Being in the loan department, he had access to the cash drawer and he would know whether we were short of money or not.

Q. Prior to the giving of the security, you had asked Mr. Kleinman to borrow some money at the Union Bank & Trust Company so that you would have sufficient funds with which to make loans, isn't that correct?

Mr. Wolver: That is objected to as leading and suggestive.

The Referee: I am afraid that that one has to be sustained.

Q. By Mr. Chotiner: Mr. Zemansky, did you

(Testimony of Sol Zemansky.)

ever have any conversation with Mr. Kleinman relative to this borrowing of money elsewhere to be used in the business? A. Yes.

Q. Was that before or after the security was given? A. Before and after, both.

Q. Directing your attention to the time before the security was given, what conversation did you have with Mr. Kleinman regarding that subject?

A. Mr. Kleinman told me he thought he would be able to procure some money for us at the Union Bank, I believe.

Q. Did you say anything at all to Mr. Kleinman regarding that subject before he made that statement to you? A. I didn't get that question.

Q. Did you say anything at all to Mr. Kleinman regarding that subject matter before Mr. Kleinman made the [80] statement that you have just related? A. No, I don't recall.

Q. Then Mr. Kleinman volunteered the statement or first saying to you "I believe I can get some money at the Union Bank"? A. That is right.

Q. What did you say?

A. I told him I thought we would be able to use it.

Q. Tell us the rest of the conversation that was held with Mr. Kleinman regarding that subject matter; relate it.

A. He said if his loan was secured, he thought it would enable him to procure more credit at the Union Bank.

(Testimony of Sol Zemansky.)

Q. Was that conversation held before the security was given?

A. I believe it was before. [81]

Q. Will you describe to the Court where the loans or the pledges were kept at the Provident Loan Association?

A. They were kept in individual locked steel drawers.

Q. By Mr. Chotiner: After the security had been given to Mr. Kleinman, what was the method of operation of the business there whenever a customer would wish to redeem a pledge that was made there and it happened to be one of the pledges that was given to Mr. Kleinman as security?

A. The transaction was, a customer had——

Q. Mr. Zemansky, may I offer this suggestion to you. Let's proceed on the theory that his Honor was never in the Provident Loan Association and you are now explaining to [85] him, giving him a picture of just exactly how it happens from a time a customer would come in until the customer would leave.

A. You mean at the time of redemption of a pledge?

Q. At the time of redemption.

A. A customer would come in and present his ticket, and we would obtain the signature and compare it with the one on the stub, and when compared we would tell the customer what was due, and would go to the vault and take the loan out and

(Testimony of Sol Zemansky.)

deliver it to the customer, taking the money from the customer and putting the money in the cash drawer.

Q. And in redeeming a pledge that had been given to Mr. Kleinman as security, would you follow that same procedure?

A. The same procedure.

Q. Did you take that money, in a case of a pledge that had been given to Mr. Kleinman as security, and keep it separate from the rest of the funds of the Provident Loan Association?

A. No, it went in the usual cash drawer.

Q. What was done with the money after it went into the regular cash drawer?

A. It was used the same as all other cash.

Q. I take it that new loans were made with it, with that same money, is that correct? [86]

A. That is correct.

Q. Was that procedure ever changed at any time after Mr. Kleinman had been given security insofar as those pledges were concerned?

A. So far as I know, I don't think that procedure was ever changed.

Q. Now, was a list of those redemptions ever furnished to Mr. Kleinman? A. Yes.

Q. And who would furnish that list to him?

A. I think the bookkeeper at the Provident kept track of those, and Mr. Kleinman, together jointly.

Q. Then what would be done after the list had been given to him?

(Testimony of Sol Zemansky.)

A. After a certain amount of money would be run up that way, I think Mr. Kleinman would give my brother, Abe Zemansky, a check, and he used to walk down to the Union Bank and cash the check and apply it as—get the money in currency and turn it over to Mr. Kleinman, and then apply it as on the note. I think that was the mechanics of the thing. They would proceed to take new loans for the ones that had been redeemed, approximately.

Q. Mr. Zemansky, I will show you now a document entitled “Agreement,” dated the 24th of February, 1939, and ask you to inspect it and will ask you to tell me what that represents. [87]

A. That is an agreement——

Mr. Chotiner: Perhaps I can save time. May it be stipulated that, counsel, that this document dated February 24, 1939, was executed by the three Zemansky Brothers and Sam Kleinman, and relates to the transferring of pledges to Mr. Kleinman as security.

Mr. Wolver: I think this can be compared.

Mr. Chotiner: With that understanding, we offer this as Trustee’s Exhibit next in order, in evidence.

The Referee: Trustee’s Exhibit No. 4. Are you offering this also?

Mr. Chotiner: Yes, that receipt should be a part of it.

The Referee: Part of the exhibit.

(Testimony of Sol Zemansky.)

Mr. Chotiner: Yes.

The Referee: It will be attached and marked Exhibit 4.

TRUSTEE'S EXHIBIT No. 4

AGREEMENT

This Agreement, made this 24th day of February, 1939, by and between Sol Zemansky, Dave Zemansky, and Abe Zemansky, doing business under the fictitious firm names and styles of Zemansky Brothers, and the Provident Loan Association, and the State Loan Office, hereinafter referred to as "first parties," and Sam Kleinman, hereinafter referred to as "second party".

Witnesseth:

Whereas: The second party has heretofore loaned to the first parties the sum of Ninety Five Thousand Seven Hundred (\$95,700.00) Dollars, which is evidenced by fifteen (15) promissory notes, made and executed and delivered to the second party by the first parties, which are valid, subsisting, and in full force and effect, and which are now due and payable, which said notes are in the following sums and were executed on the following dates:

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

Note	Date	Due
\$20,000.00	Nov. 14, 1936	Dec. 14, 1939
19,000.00	Mar. 25, 1938	Mar. 26, 1938
3,000.00	July 26, 1938	July 26, 1938
2,000.00	July 26, 1938	Aug. 25, 1938
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
5,000.00	July 1, 1936	July 2, 1936
1,700.00	Dec. 17, 1938	Dec. 18, 1938

and

Whereas: Second party has heretofore loaned to Sol Zemansky the sum of Two Thousand Four Hundred Fifty (\$2,450.00) Dollars, evidenced by a promissory note in the sum of Two Thousand Four Hundred Fifty (\$2,450.00) Dollars, made, executed and delivered to the second party by Sol Zemansky on the 7th day of April, 1936, which is now valid, subsisting and in full force and effect, and which is now due and payable, and

Whereas: Second party loaned to one Max Golob the sum of Six Hundred Twenty (\$620.00) Dollars, evidenced by two (2) promissory notes in the sum of Three Hundred Ten (\$310.00) Dollars each, made, executed and delivered to second party by the said Max Golob on the 1st day of May, 1936, and due on the 1st day of August 1936 and on the 1st

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

day of October 1936, and which notes were endorsed and guaranteed by Sol Zemansky, and

Whereas: The interest payments due on the said note made by Sol Zemansky has not been paid to date and now amounts to the sum of Four Hundred Eighty Six (\$486.00) Dollars, and

Whereas: The interest payments due on the notes executed by the said Max Golob have not been paid to date and equal the sum of One Hundred Twenty-three (\$123.00) Dollars, and

Whereas: The parties hereto are desirous of having each of said notes cancelled and replaced respectively by twenty (20) new notes in the sum of Five Thousand (\$5,000.00) Dollars each, to be made, executed and delivered by first parties to second party in the manner and form of the note attached hereto and made a part hereof, and

Whereas: The parties hereto are desirous of having said promissory notes secured by way of pledge, and

Whereas: First parties are now engaged in the business of pawn-broking, and have in their possession pawn tickets executed by lenders of money from first parties, each ticket being distinguished by a certain serial number and being entitled Provident Loan Association, and

Whereas: First parties are desirous of pledging said pawn tickets to second party as security for payment of the said twenty (20) promissory notes.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

Now, Therefore, It Is Hereby Mutually Agreed by and Between the Parties Hereto, as Follows, To-Wit:

First: That all of the notes heretofore made, executed, and delivered by first parties, Sol Zemansky and Max Golob to second party, shall be cancelled by second party and in consideration thereof, first parties do hereby agree to make, execute, and deliver to second party twenty (20) promissory notes, in words and figures as set forth in the promissory note hereto attached and made a part hereof.

Second: First parties do hereby agree to transfer and deposit, by way of pledge with said second party as collateral security for the payment of said twenty (20) promissory notes, together with all interest, costs, expenses, and fees that may accrue thereon, the pledge agreements and pawn tickets, the numbers of which are contained in Exhibit A attached hereto and made a part hereof, which are now in the possession of the first parties.

Third: In case of the non-payment of the said promissory notes, or the interest thereon, when due, according to the tenor thereof, first parties do hereby appoint and constitute second party, his heirs or assigns, their attorney irrevocable, with power of substitution to sell, without advertising, at any time after any of said notes or interest thereon become due, with or without notice or demand, at the option of said second party, the whole or any part of said security, either at public or private

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

sale, at his discretion; and to deliver the same to the purchaser or purchasers; and the proceeds to be applied to the payment of said promissory notes or note, interest due, attorney's fees, and other expenses accruing thereupon, and any surplus after payment of said note, interest, and expenses to be paid to first parties. And first parties do hereby agree to pay on demand to said second party, his heirs or assigns, whatever deficit may result after applying the net proceeds of such sale to payment of said principal, expenses, and attorney's fees. Should any such sale be made, second party, or his assigns, directly or in the name of any other person, shall have the right to purchase.

Fourth: Second party does hereby appoint first parties his agent and first parties do hereby agree to act as agent for second party, without charge to second party, for the purpose of collecting any and all sums of money which may be due, owing, or unpaid upon and in respect to each of the said pawn tickets, and pledge agreements, and first parties do hereby agree to collect such moneys and hold the same in trust for the purpose of applying such money so collected to the payment of the twenty (20) promissory notes hereinbefore described, and first parties will, upon demand, so pay *the* apply said moneys to the payment of the said promissory notes.

Fifth: First parties do hereby waive the pro-

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

visions of Sections 3001 and 3006 of the Civil Code of the State of California.

Sixth: In case suit or action be brought by second party to enforce the terms and provisions of this agreement or of any of said notes executed by first parties, or in the event of a sale of the personal property herein pledged by first parties, first parties agree to pay reasonable attorney's fees incurred by second party in such suit, action, or sale.

Seventh: First parties do hereby agree to retain in their possession every article pledged and pawned to them in respect to and by virtue of the foregoing pawn tickets, and to deliver them to the owners thereof, or assignees of said owners, only upon redemption of said pawn tickets by the payment of the same as provided in Section 3 of Statutes of California, 1935, Page 1613; and after the expiration of time limited by the terms of said Paragraph 3 of said Act, first parties shall hold any such articles so pledged and pawned for the benefit of and to the order of second party.

Eighth: First party shall keep true and accurate books, records, and accounts respecting the articles pledged and pawned and collection of the moneys due upon the above-described pawn tickets, and all such books, records, and accounts shall be open to inspection by second party at all reasonable times.

Ninth: Neither this agreement nor any of the terms, provisions, nor covenants herein are deemed

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

to nor shall the same be construed to mean that second party is a partner or joint adventurer with first parties, but that the meaning and intent of this agreement is that second party is a lender, creditor and pledgor of first parties.

Tenth: The benefits and burdens of this agreement shall run, *inrue* to and bind each of the parties hereto, his heirs, administrators and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals, on the date first herein mentioned.

SOL ZEMANSKY

DAVE ZEMANSKY

ABE ZEMANSKY

First Parties

S. KLEINMAN

Second Party.

(Copy)

\$5000.00.

February 24, 1939.

5 days after date, without grace, we promise to pay to the order of S. Kleinman Five Thousand and no/100 (\$5000.00) Dollars, For Value received, with interest from date at the rate of 10 per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at Los Angeles, California, and in case suit is instituted to collect this note or any portion thereof, we promise

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

ZEMANSKY BROS.

PROVIDENT LOAN ASSN.

&

STATE LOAN OFFICE

No. Due March 1939.

EXHIBIT A

No.	Amount	No.	Amount
1184.....	\$ 65.00	7042.....	\$125.00
1700.....	60.	7062.....	150.
2910.....	85.	7089.....	80.
3039.....	65.	7140.....	100.
3211.....	150.	7223.....	60.
3335.....	100.	7494.....	125.
3901.....	60.	7557.....	148.
4103.....	50.	7702.....	70.
4150.....	75.	7982.....	50.
5582.....	75.	8001.....	40.
5834.....	100.	8248.....	35.
5887.....	80.	8278.....	50.
5918.....	145.	8362.....	55.
6071.....	120.	8563.....	40.
6345.....	110.	8717.....	110.
6346.....	100.	8889.....	100.
6373.....	100.	8941.....	75.
6428.....	65.	8972.....	75.
6714.....	100.	8973.....	75.
6718.....	120.	9185.....	120.
6798.....	50.	9769.....	85.
6844.....	35.	9869.....	35.
6945.....	160.	10249.....	40.
7017.....	55.	10376.....	155.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
11384.....	\$ 50.00	18134.....	\$ 50.00
11657.....	115.	18329.....	50.
11856.....	65.	18349.....	60.
12214.....	90.	18743.....	110.
12370.....	175.	18846.....	50.
12663.....	125.	18861.....	125.
12664.....	75.	19123.....	65.
12847.....	150.	19279.....	65.
13013.....	50.	19325.....	70.
113424.....	100.	19335.....	50.
13471.....	70.	19362.....	50.
13591.....	125.	19643.....	65.
13745.....	50.	19668.....	50.
13848.....	115.	19720.....	100.
13929.....	100.	19873.....	85.
13984.....	85.	19925.....	50.
14013.....	100.	19963.....	50.
14106.....	65.	20206.....	50.
14180.....	125.	20243.....	80.
14227.....	100.	20322.....	125.
14285.....	75.	20362.....	150.
14376.....	100.	20409.....	50.
14504.....	75.	20424.....	75.
14581.....	50.	20443.....	50.
14981.....	70.	20458.....	100.
15053.....	40.	20507.....	60.
15239.....	60.	20501.....	60.
15060.....	60.	20520.....	75.
16131.....	59.	20750.....	65.
16672.....	100.	20162.....	100.
16883.....	55.	21083.....	60.
16973.....	40.	21111.....	100.
17054.....	150.	21199.....	125.
17084.....	150.	21237.....	75.
17126.....	50.	21366.....	100.
17593.....	75.	21557.....	125.
17767.....	100.	21600.....	50.
17762.....	150.	21721.....	175.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
21752.....	\$ 50.00	25250.....	\$ 75.00
21772.....	150.	25277.....	120.
21794.....	60.	25312.....	55.
21878.....	70.	25363.....	125.
22245.....	85.	25424.....	150.
22330.....	50.	25482.....	70.
22718.....	75.	25529.....	160.
22732.....	65.	25600.....	50.
22780.....	85.	25668.....	75.
22925.....	50.	25703.....	85.
22941.....	60.	25728.....	100.
23069.....	90.	25760.....	100.
23084.....	50.	25822.....	100.
23120.....	75.	25910.....	75.
23128.....	85.	25917.....	125.
23441.....	100.	26021.....	50.
23243.....	85.	26041.....	65.
23642.....	70.	26076.....	85.
23919.....	85.	26123.....	100.
23965.....	60.	26160.....	50.
24005.....	50.	26174.....	125.
24060.....	150.	26245.....	50.
24115.....	100.	26336.....	125.
24246.....	75.	26604.....	60.
24253.....	100.	26723.....	75.
24290.....	50.	26818.....	50.
24407.....	60.	26875.....	60.
24462.....	150.	26905.....	65.
24547.....	50.	26878.....	100.
24602.....	50.	27101.....	50.
24672.....	175.	27144.....	50.
24706.....	100.	27249.....	50.
24773.....	75.	27282.....	50.
24812.....	50.	27347.....	100.
24923.....	75.	27441.....	100.
24989.....	50.	27540.....	80.
25078.....	50.	27581.....	50.
25201.....	50.		

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
27672.....	\$100.00	29453.....	\$ 70.00
27674.....	50.	29458.....	55.
27765.....	50.	29512.....	75.
27799.....	150.	29520.....	100.
27817.....	60.	29646.....	100.
27846.....	75.	29681.....	75.
27849.....	70.	29729.....	75.
27917.....	142.	29747.....	85.
27988.....	50.	29807.....	50.
28130.....	60.	29885.....	85.
28175.....	125.	29900.....	30.
28206.....	115.	29925.....	150.
28207.....	130.	29948.....	125.
28245.....	75.	29972.....	100.
28295.....	150.	29984.....	100.
28477.....	50.	30029.....	85.
28496.....	85.	30052.....	60.
28529.....	100.	30135.....	125.
28534.....	50.	30137.....	125.
28557.....	50.	30144.....	50.
28580.....	150.	30183.....	175.
28709.....	125.	30184.....	160.
28711.....	150.	30236.....	175.
28836.....	150.	30238.....	100.
28884.....	50.	30323.....	80.
28928.....	150.	30430.....	60.
28975.....	70.	30445.....	100.
29063.....	50.	30481.....	50.
29083.....	75.	30554.....	50.
29186.....	65.	30639.....	50.
28189.....	50.	30655.....	50.
29227.....	75.	30755.....	75.
29259.....	50.	30796.....	65.
29272.....	50.	30827.....	125.
29280.....	60.	30842.....	80.
29337.....	100.	30878.....	100.
29369.....	160.	30883.....	150.
29440.....	150.	30935.....	150.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
31047.....	\$100.00	32325.....	\$100.00
31056.....	50.	32328.....	100.
31027.....	90.	32329.....	60.
31046.....	100.	32357.....	50.
31059.....	75.	32369.....	75.
31157.....	50.	32384.....	100.
31231.....	50.	32385.....	50.
31300.....	85.	32410.....	50.
31329.....	130.	32414.....	135.
31347.....	90.	32443.....	80.
31391.....	75.	32460.....	50.
31408.....	75.	32508.....	150.
31448.....	50.	32515.....	150.
31474.....	175.	32576.....	110.
31481.....	125.	32673.....	50.
31494.....	50.	32682.....	100.
31702.....	65.	32684.....	75.
31747.....	85.	32735.....	50.
31780.....	125.	32775.....	60.
31800.....	75.	32780.....	75.
31802.....	162.	32786.....	50.
31911.....	100.	32905.....	150.
31936.....	100.	33005.....	50.
31955.....	50.	33006.....	50.
31987.....	50.	33103.....	125.
31997.....	90.	33258.....	75.
32012.....	90.	33296.....	60.
32054.....	85.	33314.....	150.
32079.....	100.	33332.....	120.
32104.....	50.	33401.....	75.
32134.....	124.	33442.....	100.
32184.....	75.	33470.....	55.
32210.....	150.	33598.....	75.
32213.....	50.	33630.....	75.
32266.....	100.	33647.....	100.
32273.....	85.	33668.....	75.
32281.....	100.	33685.....	125.
32284.....	175.	33715.....	175.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
33730.....	\$ 60.00	34872.....	\$125.00
33758.....	52.	34876.....	65.
33847.....	50.	34897.....	50.
33853.....	65.	34925.....	50.
33910.....	50.	34938.....	100.
33931.....	150.	34955.....	150.
33937.....	65.	34962.....	75.
33952.....	100.	34963.....	70.
33973.....	150.	35027.....	60.
33972.....	50.	35051.....	50.
34039.....	65.	35056.....	150.
34042.....	75.	35070.....	150.
34124.....	100.	35094.....	85.
34158.....	135.	35095.....	100.
34162.....	60.	35138.....	75.
34170.....	50.	35140.....	50.
34189.....	50.	35169.....	50.
34201.....	150.	35174.....	85.
34234.....	50.	35203.....	50.
34243.....	175.	35204.....	50.
34265.....	60.	35213.....	75.
34275.....	75.	35215.....	50.
34304.....	100.	35228.....	50.
34389.....	50.	35247.....	175.
34414.....	50.	35254.....	100.
34460.....	65.	35268.....	150.
34489.....	150.	35279.....	75.
34674.....	150.	35282.....	65.
34695.....	50.	35283.....	100.
34705.....	100.	35295.....	100.
34711.....	50.	35304.....	75.
34734.....	150.	35321.....	150.
34778.....	70.	35361.....	65.
34823.....	125.	35382.....	150.
34839.....	60.	35392.....	100.
34847.....	65.	35409.....	150.
34867.....	60.	35466.....	50.
		35497.....	55.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
35498.....	\$175.00	36328.....	\$ 75.00
35511.....	150.	36332.....	75.
35551.....	65.	36380.....	100.
35610.....	50.	36446.....	70.
35623.....	60.	36497.....	100.
35665.....	50.	36506.....	50.
35668.....	50.	36539.....	125.
35717.....	125.	36565.....	50.
35767.....	55.	36570.....	65.
35813.....	75.	36638.....	60.
35821.....	50.	36682.....	85.
35884.....	65.	36710.....	50.
35920.....	150.	36722.....	75.
35933.....	60.	36735.....	60.
35980.....	100.	36785.....	125.
35996.....	150.	36798.....	90.
36015.....	50.	25825.....	85.
36019.....	125.	36843.....	60.
36025.....	50.	36886.....	75.
36085.....	60.	36898.....	60.
36097.....	50.	36903.....	100.
36103.....	85.	36917.....	75.
36129.....	50.	36937.....	65.
36141.....	50.	36954.....	60.
36143.....	60.	36985.....	65.
36169.....	75.	37016.....	100.
36170.....	75.	37052.....	90.
36207.....	75.	37063.....	50.
36214.....	50.	37065.....	80.
36222.....	125.	37102.....	50.
36228.....	60.	37125.....	75.
36236.....	90.	37216.....	75.
36244.....	50.	37218.....	50.
36257.....	115.	37226.....	50.
36271.....	50.	37243.....	150.
36305.....	85.	37275.....	75.
36309.....	115.	37289.....	125.
36327.....	100.	37306.....	100.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
37307.....	\$ 75.00	38055.....	\$140.00
37308.....	100.	38068.....	150.
37336.....	175.	38091.....	85.
37338.....	75.	38125.....	100.
37362.....	55.	38151.....	50.
37393.....	150.	38170.....	75.
37429.....	50.	38183.....	125.
37502.....	75.	38203.....	50.
37521.....	60.	38213.....	50.
37575.....	50.	38216.....	75.
37598.....	75.	38231.....	75.
37618.....	50.	38328.....	100.
37619.....	50.	38362.....	50.
37662.....	50.	38418.....	100.
37744.....	75.	38428.....	50.
37757.....	55.	38459.....	100.
37760.....	50.	38498.....	125.
37770.....	50.	38512.....	100.
37776.....	125.	38543.....	60.
37795.....	65.	38619.....	100.
37809.....	65.	38638.....	60.
37814.....	125.	38645.....	50.
37821.....	55.	38658.....	175.
37833.....	60.	38687.....	200.
37838.....	80.	38697.....	100.
37864.....	50.	38701.....	55.
37895.....	175.	38762.....	50.
37901.....	100.	38763.....	75.
37949.....	50.	38770.....	100.
37989.....	80.	38776.....	75.
37980.....	75.	38782.....	175.
37990.....	75.	38787.....	125.
37995.....	100.	38811.....	75.
38003.....	50.	38816.....	125.
38006.....	100.	38830.....	75.
38023.....	100.	38841.....	110.
38038.....	150.	38874.....	100.
		38903.....	50.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
38909.....	\$ 60.00	39725.....	\$ 60.00
38937.....	85.	39735.....	150.
38971.....	60.	39757.....	75.
39024.....	65.	39776.....	125.
39031.....	125.	39777.....	65.
39041.....	75.	39814.....	150.
39046.....	175.	39816.....	75.
39053.....	75.	39891.....	150.
39059.....	200.	39912.....	200.
39069.....	50.	39915.....	50.
39120.....	75.	39917.....	150.
39132.....	50.	39921.....	150.
39182.....	50.	39945.....	150.
39191.....	50.	39991.....	175.
39232.....	75.	39994.....	150.
39235.....	60.	40002.....	80.
39273.....	70.	40006.....	100.
39277.....	125.	40047.....	50.
39302.....	50.	40061.....	50.
39308.....	65.	40062.....	65.
39313.....	50.	40071.....	50.
39332.....	110.	40077.....	60.
39350.....	150.	40125.....	100.
39364.....	85.	40127.....	150.
39380.....	50.	40154.....	50.
39392.....	50.	40167.....	75.
39427.....	55.	40117.....	65.
39435.....	100.	40189.....	50.
39446.....	100.	40190.....	50.
39449.....	50.	40233.....	65.
39451.....	70.	40253.....	105.
39484.....	50.	40266.....	70.
39521.....	100.	40274.....	150.
39546.....	125.	40313.....	65.
39563.....	50.	40381.....	50.
39574.....	50.	40388.....	65.
39626.....	50.	40404.....	80.
39651.....	100.		

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
40418.....	\$ 60.00	41071.....	\$ 75.00
40424.....	150.	41082.....	50.
40443.....	100.	41085.....	150.
40445.....	60.	41095.....	50.
40486.....	90.	41103.....	100.
40490.....	100.	41110.....	50.
40537.....	75.	41115.....	50.
40541.....	160.	41136.....	75.
40550.....	50.	41143.....	75.
40571.....	50.	41148.....	50.
40576.....	50.	41154.....	50.
40607.....	200.	41192.....	100.
40615.....	150.	41193.....	100.
40653.....	185.	41233.....	50.
40662.....	150.	41224.....	125.
40666.....	60.	41245.....	50.
40672.....	70.	41281.....	200.
40690.....	50.	41301.....	100.
40756.....	85.	41312.....	75.
40778.....	60.	41347.....	80.
40789.....	100.	41362.....	160.
40818.....	50.	41443.....	90.
40824.....	135.	41454.....	175.
40825.....	115.	41455.....	60.
40830.....	130.	41468.....	50.
40853.....	150.	41487.....	65.
40859.....	80.	41504.....	175.
40860.....	75.	41516.....	70.
40869.....	75.	41534.....	75.
40876.....	75.	41545.....	175.
40884.....	75.	41566.....	65.
40888.....	125.	41601.....	80.
40909.....	75.	41638.....	60.
40929.....	200.	41644.....	150.
40930.....	50.	41647.....	65.
40991.....	200.	41669.....	50.
41045.....	75.	41701.....	50.
41051.....	50.	41706.....	75.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
41707.....	\$100.00	42459.....	\$ 60.00
41727.....	50.	42466.....	65.
41742.....	125.	42470.....	75.
41760.....	50.	42487.....	50.
41778.....	175.	42507.....	125.
41852.....	175.	42516.....	100.
41869.....	60.	42526.....	50.
41873.....	175.	42528.....	200.
41877.....	125.	42593.....	85.
41889.....	50.	42599.....	175.
41922.....	125.	42634.....	100.
41972.....	150.	42639.....	150.
41973.....	100.	42655.....	60.
42000.....	50.	42659.....	60.
42004.....	50.	42677.....	50.
42011.....	90.	42690.....	100.
42023.....	50.	42695.....	75.
42036.....	100.	42703.....	150.
42055.....	50.	42716.....	75.
42089.....	125.	42737.....	110.
42104.....	150.	42742.....	100.
42141.....	75.	42757.....	150.
42143.....	80.	42763.....	50.
42180.....	200.	42777.....	60.
42187.....	50.	42780.....	75.
42190.....	50.	42782.....	125.
42229.....	60.	42810.....	75.
42243.....	100.	42829.....	100.
42249.....	50.	42859.....	60.
42264.....	50.	42870.....	75.
42305.....	50.	42949.....	200.
42325.....	75.	42983.....	150.
42345.....	75.	42996.....	50.
42367.....	100.	43039.....	150.
42372.....	75.	43050.....	70.
42387.....	75.	43057.....	175.
42420.....	75.	43075.....	150.
42434.....	90.	43099.....	50.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
43109.....	\$125.00	43715.....	\$150.00
43130.....	125.	43766.....	60.
43153.....	75.	43779.....	65.
43169.....	60.	43785.....	200.
43175.....	70.	43790.....	65.
43200.....	100.	43798.....	175.
43227.....	50.	43812.....	125.
43233.....	60.	43832.....	50.
43234.....	75.	43845.....	60.
43284.....	100.	43860.....	55.
43295.....	125.	43873.....	80.
43296.....	50.	43916.....	200.
43302.....	125.	43938.....	50.
43306.....	65.	43994.....	60.
43310.....	100.	44051.....	60.
43314.....	75.	44058.....	135.
43323.....	100.	44063.....	60.
43327.....	125.	44076.....	125.
43343.....	75.	44094.....	135.
43351.....	50.	44096.....	85.
43367.....	80.	44120.....	75.
43372.....	100.	44121.....	125.
43380.....	50.	44128.....	75.
43397.....	75.	44153.....	75.
43416.....	75.	44156.....	100.
43430.....	60.	44170.....	75.
43448.....	50.	44173.....	125.
43461.....	55.	44199.....	55.
43503.....	200.	44201.....	50.
43533.....	75.	44204.....	200.
43542.....	125.	44208.....	150.
43564.....	100.	44229.....	65.
43593.....	100.	44230.....	65.
43613.....	50.	44232.....	65.
43632.....	100.	44244.....	200.
43641.....	60.	44260.....	200.
43652.....	125.	44298.....	85.
		44317.....	50.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
44323.....	\$150.00	44833.....	\$ 50.00
44331.....	50.	44855.....	125.
44339.....	125.	44864.....	100.
44356.....	75.	44875.....	80.
44357.....	75.	44896.....	70.
44360.....	50.	44901.....	60.
44398.....	75.	44907.....	135.
44402.....	60.	44938.....	50.
44407.....	50.	44953.....	90.
44408.....	50.	44957.....	85.
44410.....	50.	44959.....	100.
44418.....	50.	44960.....	80.
44442.....	65.	44966.....	50.
44448.....	70.	44976.....	60.
44458.....	100.	44983.....	75.
44460.....	65.	44993.....	100.
44469.....	50.	45006.....	200.
44494.....	50.	45013.....	60.
44496.....	60.	45026.....	150.
44550.....	100.	45029.....	200.
44576.....	50.	45083.....	100.
44577.....	50.	45096.....	75.
44593.....	100.	45135.....	125.
44635.....	125.	45148.....	85.
44665.....	50.	45156.....	75.
44668.....	135.	45154.....	105.
44680.....	50.	45158.....	60.
44692.....	125.	45159.....	100.
44697.....	50.	45171.....	150.
44709.....	75.	45173.....	50.
44720.....	50.	45188.....	80.
44726.....	100.	45195.....	125.
44731.....	50.	45198.....	100.
44739.....	75.	45199.....	200.
44743.....	60.	45235.....	50.
44764.....	100.	45254.....	175.
44799.....	125.	45260.....	50.
44802.....	125.	45334.....	75.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
45337.....	\$ 50.00	45767.....	\$235.00
45345.....	150.	45775.....	100.
45349.....	50.	45781.....	75.
45356.....	65.	45788.....	50.
45371.....	100.	45839.....	100.
45377.....	200.	45851.....	50.
45386.....	50.	45858.....	50.
45387.....	50.	45866.....	50.
45395.....	200.	45872.....	50.
45396.....	150.	45884.....	50.
45399.....	125.	45893.....	50.
45428.....	100.	45894.....	85.
45470.....	75.	45896.....	100.
45481.....	150.	45898.....	125.
45483.....	150.	45911.....	85.
45501.....	125.	45913.....	50.
45524.....	150.	45927.....	60.
45537.....	150.	45928.....	50.
45540.....	50.	45939.....	70.
45573.....	50.	45945.....	100.
45577.....	70.	45958.....	150.
45601.....	50.	45982.....	125.
45604.....	75.	45990.....	100.
45611.....	225.	46011.....	115.
45633.....	55.	46023.....	50.
45651.....	50.	46024.....	60.
45663.....	65.	46054.....	100.
45668.....	65.	46064.....	200.
45688.....	50.	46083.....	75.
45695.....	50.	46084.....	150.
45710.....	50.	46086.....	200.
45712.....	50.	46099.....	50.
45719.....	75.	46118.....	50.
45730.....	100.	46129.....	50.
45748.....	100.	46130.....	100.
45763.....	150.	46135.....	50.
45766.....	60.	46169.....	150.
		46197.....	125.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
46205.....	\$125.00	46855.....	\$125.00
46238.....	50.	46914.....	200.
46261.....	100.	46947.....	65.
46266.....	50.	46990.....	50.
46271.....	125.	47001.....	50.
46279.....	50.	47003.....	60.
46291.....	85.	47014.....	60.
46295.....	75.	47023.....	50.
46297.....	125.	47030.....	50.
46300.....	125.	47033.....	150.
46321.....	60.	47035.....	50.
46351.....	100.	47042.....	50.
46368.....	50.	47048.....	150.
46380.....	60.	47049.....	50.
46390.....	150.	47051.....	50.
46400.....	50.	47061.....	50.
46406.....	50.	47075.....	150.
46475.....	50.	47093.....	75.
46502.....	150.	47121.....	100.
46507.....	50.	47128.....	100.
46518.....	125.	47130.....	70.
46555.....	75.	47150.....	50.
46557.....	50.	47159.....	50.
46574.....	200.	47188.....	125.
46591.....	150.	47189.....	50.
46636.....	60.	47200.....	50.
46639.....	60.	47253.....	50.
46649.....	100.	47255.....	100.
46654.....	150.	47341.....	650.
46666.....	75.	47353.....	150.
46722.....	150.	47354.....	60.
46732.....	50.	47381.....	175.
46784.....	175.	47388.....	50.
46794.....	50.	47415.....	50.
46804.....	200.	47426.....	85.
46817.....	150.	47433.....	150.
46845.....	50.	47489.....	50.
46852.....	150.	47498.....	50.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

No.	Amount	No.	Amount
47508.....	\$ 70.00	47885.....	\$ 60.00
47513.....	65.	47894.....	50.
47522.....	75.	47908.....	50.
47561.....	50.	47909.....	100.
47575.....	65.	47923.....	75.
47580.....	75.	47929.....	200.
47591.....	60.	47930.....	50.
47606.....	50.	47952.....	50.
47609.....	75.	47965.....	75.
47610.....	150.	47976.....	80.
47636.....	50.	47977.....	100.
47690.....	125.	47978.....	60.
47695.....	60.	47985.....	100.
47698.....	60.	48002.....	100.
47703.....	75.	48016.....	60.
47704.....	100.	48028.....	60.
47717.....	150.	48058.....	50.
47719.....	150.	48063.....	50.
47738.....	50.	48066.....	60.
47740.....	60.	48072.....	60.
47780.....	60.	48087.....	75.
47783.....	200.	48115.....	100.
47787.....	100.	48117.....	75.
47788.....	75.	48126.....	350.
47810.....	100.	48138.....	50.
47837.....	60.	48139.....	50.
47854.....	75.	48161.....	50.
47862.....	50.		
47872.....	65.		

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

MISCELLANEOUS NUMBERS

No.	Amount	No.	Amount
92380.....	\$120.00	37438.....	\$230.00
26528.....	175.	32323.....	50.
27346.....	175.	28993.....	100.
28441.....	175.	42414.....	50.
39246.....	300.	46198.....	100.
39411.....	250.	43958.....	100.
43950.....	250.	23342.....	125.
42818.....	275.	27889.....	100.
43076.....	275.	48039.....	60.
46249.....	100.	45025.....	150.
35771.....	75.	24368.....	50.
33297.....	150.	29173.....	175.
32971.....	125.		
32778.....	100.		

Receipt of Pledge

I hereby acknowledge receipt of those certain pledge agreements and pawn tickets described in that certain contract executed on the 24th day of February, by and between the undersigned, and Sol Zemansky, Dave Zemansky and Abe Zemansky, doing business as the Provident Loan Association, State Loan Office, and Zemansky Brothers, in accordance with and pursuant to the terms of the said Agreement.

Dated this 24th day of February, 1939.

S. KLEINMAN

Sam Kleinman.

Receipt

The undersigned, Sol Zemansky, Dave Zemansky and Abe Zemansky, doing business as the Provident

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 4 (Continued)

Loan Association, State Loan Office, and Zemansky Brothers, hereby acknowledge that they have received from Sam Kleinman, the temporary custody of those certain pledge agreements and pawn-tickets described in that certain contract executed on the 24th day of February, 1939, by and between the undersigned and Sam Kleinman, for the limited purpose of using the same in accordance with the requirements of the aforesaid agreement.

It is understood that said pawn-tickets will be kept separate and apart from pawn-tickets belonging to the undersigned, and will not be commingled in any way with other pawn-tickets.

Dated: This 24th day of February, 1939.

SOL ZEMANSKY, DAVE

ZEMANSKY and ABE

ZEMANSKY, doing business

as the PROVIDENT LOAN

ASSOCIATION, STATE

LOAN OFFICE and

ZEMANSKY BROTHERS

By: ABE ZEMANSKY

Mr. Chotiner: May it be stipulated, also, gentlemen, for the purpose of saving time, that the subsequent contracts that were executed by the bankrupts and Mr. Kleinman, copies of them or

(Testimony of Sol Zemansky.)

the originals of them, are attached to the original claim on file herein.

Mr. Wolver: That is so stipulated.

Mr. Dienstag: The extra sheet of paper is part of the contract as well as part of the exhibit.

The Referee: All right.

Mr. Chotiner: The receipt. [88]

Mr. Dienstag: Yes.

The Referee: I will mark it together.

Mr. Chotiner: We will accept that stipulation; and we ask now to introduce as Trustee's exhibit next in order by reference copies of the contracts attached to the claim on file.

The Referee: You are just going to encumber the record. The claim itself is part of the record. You can simply stipulate that copies attached to the claim as exhibits to the claim are true and correct copies of the agreements in question.

Mr. Dienstag: So stipulated.

Mr. Laugharn: So that the Court will have a clear understanding of that, there was the agreement itself, and then Mr. Kleinman executed an instrument called a receipt of pledge, and then there was a further receipt executed by the bankrupts, whereby the bankrupts acknowledged that they have received from Mr. Kleinman temporary custody of the pledge agreements involved; so there are three instruments to each contract; isn't that correct?

Mr. Dienstag: Yes, but they all form part of one agreement.

(Testimony of Sol Zemansky.)

Mr. Laugharn: They are all clipped to the same one.

Mr. Dienstag: Yes.

Mr. Laugharn: That covers it.

The Referee: I should think then that you ought to [89] offer in evidence a specimen of that receipt, the second receipt to which you refer.

Mr. Wolver: It is attached.

Mr. Laugharn: The agreement is three instruments; first, a mimeographed instrument five pages long, then Exhibit A attached, then a sheet entitled "Receipt of pledge," and then another sheet entitled "Receipt," to each one of the agreements. This is not the one that was handed to the Court first. That is where I wanted to straighten the Court out.

The Referee: Is it all here; take a look at it.

Mr. Laugharn: They are not the same. This is Trustee's Exhibit No. 4. Now, this agreement is a basic agreement covering the \$100,000. After that there was a substitution of agreements which are attached to the claim. Those are not the same as this contract.

The Referee: A different form entirely?

Mr. Laugharn: The contract consists of three instruments, which I think in each instance are clipped together; first, a five-page mimeographed contract, with Exhibit A attached; second, a receipt of pledge, and, third, a receipt.

The Referee: You say this is a different form than Trustee's Exhibit 4.

(Testimony of Sol Zemansky.)

Mr. Laugharn: Yes.

The Referee: But the subsequent agreements are on the same form. [90]

Mr. Laugharn: Yes.

The Referee: Let us handle it this way. Let us mark as Trustee's Exhibit 5 by reference the copy of the contract dated March 2, 1939, covering the loan of \$25,920.50, attached to Kleinman's claim. Then let us put in as the next exhibit——

TRUSTEE'S EXHIBIT No. 5

(By Reference)

AGREEMENT

This Agreement, made this 2nd day of March, 1939, by and between Sol Zemansky, Dave Zemansky and Abe Zemansky, doing business under the fictitious firm names and styles of Zemansky Brothers, and the Provident Loan Association, and the State Loan Office, hereinafter referred to as "First Parties", and Sam Kleinman, hereinafter referred to as "Second Party",

Witnesseth:

Whereas, First Parties are now engaged in the business of pawnbroking and have in their possession pawn-tickets executed by lenders of money from First Parties; each ticket being distinguished by a certain serial number and being entitled "Provident Loan Association", and

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

Whereas, First Parties desire to borrow the sum of Twenty-five thousand, nine hundred twenty dollars and fifty cents (\$25,920.50) from Second Party, and

Whereas, First Parties desire to pledge the above described pawn-rickets to Second Party as security for payment of the said loan, as is more fully hereinafter set forth, and

Whereas, Second Party is willing to loan said Twenty-five thousand, nine hundred twenty dollars and fifty cents (\$25,920.50) to First Parties on the terms and conditions hereinafter set forth.

Now, Therefore, it is hereby mutually agreed by and between the parties hereto as follows, to-wit:

First: First Parties do hereby agree to make, execute and deliver to Second Party, five (5) promissory notes in the amount of Five thousand (\$5,000.00) Dollars each, and one (1) promissory note in the amount of Nine hundred twenty dollars and fifty cents (\$920.50), all in the manner and form of the notes attached hereto and made a part hereof;

Second: First Parties agree to transfer and deposit by way of a pledge with Second Party, as collateral security for the payment of each and all of said promissory notes, and as security for the payment of all interest, costs, expenses and fees that may accrue thereon, the pledge-agreements and pawn-tickets, the numbers of

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

which are contained in "Exhibit A" attached hereto and made a part hereof, which are now in the possession of First Parties;

Third: In case of the non-payment of the said promissory notes, or the interest thereon, when due, according to the tenor thereof, First Parties do hereby appoint and constitute Second Party, his heirs or assigns, their attorney irrevocable, with power of substitution to sell, without advertising, at any time after any of said notes or interest thereon become due, with or without notice or demand, at the option of said Second Party, the whole or any part of said security, either at public or private sale, at his discretion; and to deliver the same to the purchaser or purchasers; and the proceeds to be applied to the payment of said promissory notes or note, interest due, attorney's fees, and other expenses accruing thereupon, and any surplus after payment of said note, interest, and expenses to be paid to First Parties. And First Parties do hereby agree to pay on demand to said Second Party, his heirs or assigns, whatever deficit may result after applying the net proceeds of such sale to payment of said principal, expenses, and attorney's fees. Should any such sale be made, Second Party, or his assigns, directly or in the name of any other person, shall have the right to purchase;

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

Fourth: Second Party does hereby appoint First Parties, his agent, and First Parties do hereby agree to act as agent for Second Party, without charge to Second Party, for the purpose of collecting any and all sums of money which may be due, owing, or unpaid upon and in respect to each of the said pawn-tickets, and pledge-agreements, and First Parties do hereby agree to collect such moneys and hold the same in trust for the purpose of applying such money so collected to the payment of the six (6) promissory notes hereinbefore described, and First Parties will, upon demand, so pay and apply said moneys to the payment of the said promissory notes;

Fifth: First Parties do hereby waive the provisions of Sections 3001 and 3006 of the Civil Code of the State of California;

Sixth: In case suit or action be brought by Second Party to enforce the terms and provisions of this agreement or of any of said notes executed by First Parties, or in the event of a sale of the personal property herein pledged by First Parties, First Parties agree to pay reasonable attorney's fees incurred by Second Party in such suit, action, or sale;

Seventh: First Parties do hereby agree to retain in their possession every article pledged and pawned to them in respect to and by virtue

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

of the foregoing pawn-tickets, and to deliver them to the owners thereof, or assignees of said owners, only upon redemption of said pawn-tickets by the payment of the same as provided in Section 3 of Statutes of California, 1935, Page 1613; and after the expiration of time limited by the terms of said Paragraph 3 of said Act, First Parties shall hold any such articles so pledged and pawned for the benefit of and to the order of Second Party;

Eighth: First Parties shall keep true and accurate books, records, and accounts respecting the articles pledged and pawned and collection of the moneys due upon the above described pawn-tickets, and all such books, records, and accounts shall be open to inspection by Second Party at all reasonable times;

Ninth: Neither this agreement nor any of the terms, provisions, nor covenants herein are deemed to nor shall the same be construed to mean that Second Party is a partner or joint adventurer with First Parties, but that the meaning and intent of this agreement is that Second Party is a lender, creditor and pledger of First Parties;

Tenth: The benefits and burdens of this agreement shall run, inure to and bind each of the parties hereto, his heirs, administrators and assigns.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

In Witness Whereof, the parties hereto have hereunto set their hands and seals, on the date first herein mentioned.

DAVE ZEMANSKY

SOL ZEMANSKY

ABE ZEMANSKY

“First Parties”

S. KLEINMAN

“Second Party”

EXHIBIT A

No.	Amount	No.	Amount
46755.....	\$ 40.00	46984.....	\$ 30.00
46759.....	25.00	46986.....	45.00
46773.....	25.00	47000.....	30.00
46779.....	25.00	47018.....	25.00
46799.....	25.00	47588.....	25.00
46802.....	40.00	47595.....	30.00
46810.....	40.00	47597.....	30.00
46811.....	40.00	47608.....	40.00
46816.....	30.00	47630.....	25.00
46818.....	30.00	47642.....	40.00
46840.....	35.00	48643.....	35.00
46857.....	30.00	47658.....	25.00
46869.....	35.00	47685.....	30.00
46870.....	35.00	47689.....	25.00
46880.....	25.00	47706.....	40.00
46898.....	25.00	47707.....	25.00
46910.....	35.00	47721.....	27.00
46935.....	40.00	47739.....	35.00
46936.....	25.00	47749.....	25.00
46954.....	30.00	47767.....	25.00
46959.....	40.00	47784.....	25.00
46968.....	25.00	47789.....	40.00
46970.....	30.00	47790.....	25.00
46983.....	40.00	47821.....	40.00

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
47823.....	\$ 30.00	47904.....	\$ 25.00
47832.....	35.00	47905.....	25.00
47834.....	25.00	47907.....	30.00
47847.....	30.00	47911.....	35.00
47850.....	25.00	47948.....	25.00
47869.....	30.00	47994.....	35.00
47870.....	35.00	48000.....	30.00
47040.....	30.00	48021.....	35.00
47052.....	30.00	48036.....	30.00
47055.....	35.00	48040.....	25.00
47056.....	30.00	48042.....	30.00
47059.....	35.00	47078.....	40.00
47060.....	35.00	48130.....	25.00
47167.....	35.00	48132.....	35.00
47169.....	25.00	48146.....	25.00
47173.....	30.00	48150.....	40.00
47174.....	40.00	48172.....	25.00
47179.....	30.00	48176.....	25.00
47203.....	40.00	48184.....	25.00
47206.....	30.00	48213.....	30.00
47207.....	35.00	48246.....	40.00
47218.....	25.00	48253.....	35.00
47225.....	35.00	48258.....	30.00
47233.....	30.00	48275.....	25.00
47237.....	30.00	48276.....	40.00
47241.....	40.00	48277.....	40.00
47262.....	35.00	47321.....	40.00
47275.....	45.00	47324.....	25.00
47278.....	30.00	47332.....	30.00
47293.....	25.00	47336.....	30.00
47294.....	25.00	47344.....	40.00
47303.....	25.00	47346.....	25.00
47304.....	25.00	47351.....	25.00
47308.....	30.00	47352.....	30.00
47317.....	30.00	47355.....	25.00
47895.....	40.00	47373.....	30.00
47903.....	25.00	47394.....	40.00

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
47408.....	\$ 40.00	74373.....	\$100.00
47411.....	30.00	74844.....	75.00
47414.....	45.00	75146.....	75.00
47418.....	30.00	76339.....	100.00
47429.....	25.00	77091.....	80.00
47437.....	30.00	78826.....	35.00
47438.....	35.00	79200.....	55.00
47458.....	40.00	79390.....	30.00
47500.....	25.00	79843.....	125.00
47515.....	30.00	80088.....	80.00
47518.....	25.00	81795.....	75.00
47533.....	40.00	82149.....	30.00
47539.....	25.00	82331.....	45.00
47565.....	25.00	82544.....	125.00
47569.....	25.00	82608.....	35.00
47573.....	25.00	82655.....	75.00
47587.....	35.00	83114.....	60.00
48286.....	30.00	83619.....	85.00
48290.....	30.00	84408.....	30.00
48298.....	35.00	84984.....	30.00
48385.....	40.00	89158.....	50.00
48388.....	25.00	91793.....	35.00
48407.....	25.00	92380.....	120.00
48421.....	40.00	92963.....	35.00
48435.....	30.00	93187.....	30.00
48436.....	35.00	93478.....	40.00
48464.....	25.00	94203.....	200.00
48465.....	25.00	97688.....	143.00
48469.....	40.00	94009.....	125.00
48493.....	40.00	94116.....	35.00
48494.....	40.00	94387.....	35.00
1419.....	50.00	95713.....	30.00
14940.....	110.00	96597.....	30.00
17946.....	55.00	97618.....	42.50
72721.....	40.00	97825.....	40.00
73068.....	40.00	48480.....	75.00
73657.....	40.00	48471.....	50.00
74099.....	45.00		

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
48484.....	\$100.00	31497.....	\$ 45.00
69592.....	125.00	31845.....	70.00
38753.....	25.00	33724.....	60.00
38784.....	35.00	33815.....	60.00
38831.....	35.00	35985.....	55.00
38836.....	25.00	36835.....	75.00
38854.....	25.00	39213.....	60.00
38858.....	25.00	39598.....	50.00
38894.....	40.00	40881.....	125.00
38912.....	45.00	41625.....	135.00
38988.....	35.00	42140.....	60.00
39149.....	45.00	42056.....	50.00
39152.....	30.00	42184.....	40.00
39158.....	35.00	42946.....	85.00
39159.....	35.00	43383.....	40.00
39174.....	25.00	45842.....	60.00
39177.....	30.00	46434.....	100.00
39203.....	25.00	47108.....	40.00
39212.....	25.00	47250.....	90.00
39251.....	30.00	39502.....	30.00
39269.....	35.00	39503.....	35.00
39275.....	30.00	39542.....	25.00
39314.....	30.00	39600.....	55.00
39323.....	30.00	39601.....	30.00
39381.....	25.00	39624.....	25.00
39395.....	25.00	39653.....	25.00
39439.....	25.00	39656.....	35.00
39481.....	35.00	39675.....	40.00
97950.....	100.00	39701.....	25.00
99107.....	42.50	39728.....	30.00
99552.....	30.00	39732.....	45.00
99942.....	35.00	39772.....	30.00
20323.....	140.00	39790.....	30.00
21579.....	110.00	39805.....	30.00
23186.....	45.00	39829.....	30.00
23995.....	60.00	39845.....	25.00
30235.....	125.00	39890.....	25.00
30615.....	150.00	39893.....	35.00

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
39936.....	\$ 40.00	48459.....	\$ 50.00
39951.....	40.00	48473.....	50.00
39997.....	35.00	40256.....	40.00
40017.....	35.00	40268.....	45.00
40089.....	35.00	40290.....	40.00
40138.....	25.00	40308.....	35.00
40160.....	40.00	40325.....	35.00
40165.....	25.00	40331.....	35.00
40188.....	37.50	40337.....	40.00
40247.....	25.00	40338.....	25.00
40243.....	40.00	40366.....	25.00
47284.....	40.00	40377.....	40.00
47572.....	125.00	40438.....	35.00
47578.....	125.00	40469.....	40.00
47604.....	175.00	40484.....	25.00
47938.....	80.00	40543.....	33.00
48136.....	75.00	40567.....	25.00
43166.....	125.00	40584.....	40.00
48297.....	90.00	40587.....	40.00
48331.....	50.00	40590.....	45.00
48333.....	50.00	40611.....	35.00
48339.....	75.00	40630.....	35.00
48208.....	50.00	40649.....	45.00
48249.....	60.00	40654.....	30.00
48255.....	75.00	40658.....	25.00
48287.....	85.00	40663.....	35.00
48289.....	75.00	40708.....	25.00
48351.....	60.00	40774.....	30.00
48359.....	75.00	40839.....	35.00
48365.....	50.00	40842.....	40.00
48377.....	75.00	40855.....	25.00
48382.....	50.00	40858.....	35.00
48384.....	60.00	40875.....	25.00
48409.....	50.00	40924.....	35.00
48426.....	55.00	40970.....	35.00
48429.....	60.00	40975.....	25.00
48433.....	100.00	40998.....	35.00
48458.....	60.00		

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
41029.....	\$ 30.00	41776.....	\$ 40.00
41153.....	25.00	41777.....	40.00
41221.....	30.00	41806.....	30.00
41229.....	25.00	41902.....	30.00
41239.....	25.00	41903.....	40.00
41266.....	35.00	41910.....	30.00
41270.....	40.00	41932.....	35.00
41273.....	40.00	41938.....	25.00
41285.....	25.00	41980.....	25.00
41307.....	25.00	41991.....	25.00
41324.....	30.00	42024.....	45.00
41334.....	25.00	42025.....	25.00
41356.....	40.00	42027.....	30.00
41360.....	42.50	42035.....	40.00
41365.....	25.00	42062.....	35.00
41370.....	35.00	42081.....	30.00
41377.....	35.00	42100.....	35.00
41380.....	40.00	42109.....	25.00
41402.....	35.00	42128.....	30.00
41448.....	25.00	42139.....	25.00
41466.....	25.00	42157.....	25.00
41477.....	25.00	42168.....	30.00
41507.....	25.00	42178.....	30.00
41538.....	35.00	42212.....	40.00
41571.....	30.00	42254.....	35.00
41584.....	30.00	42255.....	35.00
41611.....	30.00	42266.....	40.00
41621.....	40.00	42288.....	30.00
41645.....	35.00	42309.....	35.00
41682.....	40.00	42333.....	100.00
41692.....	30.00	42343.....	30.00
41708.....	25.00	42353.....	35.00
41711.....	35.00	42362.....	30.00
41737.....	25.00	42363.....	30.00
41754.....	25.00	42379.....	30.00
41756.....	35.00	42380.....	30.00
41764.....	30.00	42411.....	30.00
41766.....	30.00	42419.....	25.00

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
42427.....	\$ 25.00	43232.....	\$ 40.00
42502.....	40.00	43235.....	70.00
42512.....	25.00	43286.....	30.00
42525.....	30.00	43330.....	25.00
42530.....	25.00	43331.....	30.00
42610.....	30.00	43338.....	40.00
42627.....	30.00	43350.....	35.00
42699.....	35.00	43353.....	40.00
42700.....	25.00	43361.....	25.00
42722.....	35.00	43363.....	25.00
42773.....	30.00	43368.....	35.00
42786.....	40.00	43377.....	25.00
42822.....	40.00	43382.....	25.00
42831.....	25.00	43406.....	25.00
42838.....	25.00	43426.....	35.00
42843.....	40.00	43432.....	26.00
42845.....	25.00	43434.....	35.00
42873.....	35.00	43442.....	25.00
42899.....	30.00	43443.....	30.00
42905.....	25.00	43475.....	35.00
42907.....	30.00	43484.....	40.00
42916.....	35.00	43494.....	45.00
42932.....	25.00	43502.....	30.00
42978.....	30.00	43571.....	25.00
42988.....	25.00	43616.....	25.00
42994.....	25.00	43624.....	25.00
43006.....	35.00	43630.....	25.00
43008.....	25.00	43666.....	35.00
43061.....	25.00	43669.....	25.00
43064.....	40.00	43717.....	25.00
43065.....	25.00	43725.....	25.00
43113.....	25.00	43733.....	25.00
43119.....	30.00	43742.....	25.00
43120.....	45.00	43773.....	25.00
43124.....	30.00	43781.....	35.00
43185.....	25.00	43793.....	35.00
43193.....	25.00	43810.....	40.00
43228.....	30.00	43813.....	45.00

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
43816.....	\$ 35.00	44316.....	\$ 35.00
43835.....	35.00	44368.....	35.00
43837.....	25.00	44375.....	25.00
43846.....	25.00	44388.....	45.00
43869.....	30.00	44391.....	25.00
43880.....	35.00	44413.....	25.00
43883.....	35.00	44422.....	30.00
43886.....	25.00	44462.....	45.00
43887.....	25.00	44475.....	25.00
43888.....	35.00	44488.....	35.00
43892.....	30.00	44489.....	35.00
43910.....	40.00	44490.....	25.00
43912.....	35.00	44491.....	25.00
43936.....	35.00	44497.....	45.00
43947.....	40.00	44525.....	30.00
43949.....	30.00	44532.....	25.00
43954.....	25.00	44546.....	35.00
43962.....	25.00	44551.....	38.00
44000.....	30.00	44578.....	25.00
44037.....	35.00	44590.....	30.00
44038.....	40.00	44599.....	35.00
44054.....	30.00	44600.....	35.00
44073.....	30.00	44606.....	30.00
44074.....	35.00	44622.....	40.00
44082.....	40.00	44640.....	25.00
44100.....	25.00	44659.....	25.00
44112.....	25.00	44669.....	30.00
44130.....	30.00	44361.....	30.00
44162.....	25.00	44682.....	25.00
44166.....	30.00	44696.....	30.00
44180.....	35.00	44702.....	35.00
44185.....	25.00	44703.....	25.00
44191.....	40.00	44704.....	35.00
44198.....	40.00	44708.....	35.00
44225.....	25.00	44719.....	25.00
44247.....	25.00	44725.....	30.00
44270.....	25.00	44732.....	30.00
		44751.....	25.00

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
44758.....	\$ 25.00	45281.....	\$ 30.00
44760.....	25.00	45282.....	35.00
44772.....	25.00	45283.....	25.00
44787.....	40.00	45287.....	30.00
44786.....	25.00	45296.....	30.00
44795.....	30.00	45299.....	25.00
44817.....	40.00	45313.....	25.00
44822.....	25.00	45315.....	30.00
44826.....	40.00	45331.....	30.00
44846.....	30.00	45346.....	40.00
44859.....	40.00	45350.....	40.00
44860.....	30.00	45357.....	35.00
44874.....	40.00	45380.....	30.00
44913.....	40.00	45383.....	25.00
44931.....	35.00	45406.....	35.00
44952.....	25.00	45420.....	25.00
44971.....	40.00	45432.....	35.00
44974.....	30.00	45435.....	25.00
44994.....	40.00	45436.....	35.00
45001.....	35.00	45450.....	25.00
45012.....	30.00	45455.....	25.00
45023.....	35.00	45456.....	30.00
45060.....	35.00	45459.....	25.00
45082.....	25.00	45467.....	30.00
45085.....	25.00	45484.....	40.00
45087.....	40.00	45494.....	40.00
45105.....	35.00	45517.....	25.00
45114.....	25.00	45521.....	28.00
45129.....	25.00	45522.....	35.00
45144.....	45.00	45534.....	35.00
45150.....	35.00	45533.....	40.00
45178.....	40.00	45548.....	30.00
45201.....	25.00	45555.....	30.00
45204.....	30.00	45580.....	30.00
45212.....	30.00	45582.....	35.00
45217.....	35.00	45587.....	35.00
45238.....	25.00	45597.....	35.00
45273.....	30.00	45609.....	30.00

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

No.	Amount	No.	Amount
45615.....	\$ 30.00	45850.....	\$ 25.00
45626.....	40.00	45860.....	25.00
45632.....	40.00	45867.....	40.00
45637.....	45.00	45878.....	35.00
45640.....	30.00	45904.....	30.00
45642.....	25.00	45917.....	25.00
45646.....	35.00	45920.....	35.00
45649.....	30.00	45755.....	40.00
45650.....	30.00	45761.....	25.00
45670.....	40.00	45779.....	40.00
45680.....	25.00	45786.....	25.00
45681.....	40.00	45936.....	25.00
45693.....	25.00	45942.....	40.00
45713.....	25.00	45954.....	30.00
45714.....	25.00	45964.....	30.00
45727.....	30.00	45978.....	25.00
45738.....	30.00	45994.....	35.00
45806.....	40.00	43738.....	25.00
45816.....	30.00		

\$5000.00

March 1939

.....days after date, without grace we promise to pay to the order of S. Kleinman Five Thousand and no/100 (\$5,000.00) Dollars, For Value received, with interest from date at the rate of 10 per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at Los Angeles, California and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

ZEMANSKY BROS.,

PROVIDENT LOAN ASS'N.

&

STATE LOAN OFFICE

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

\$920.50

March 1939

.....days after date, without grace we promise to pay to the order of S. Kleinman Nine Hundred Twenty and 50/100 (\$920.50) Dollars, For Value received, with interest from date at the rate of 10 per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at Los Angeles, California and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

ZEMANSKY BROS.,
PROVIDENT LOAN ASS'N.,
&
STATE LOAN OFFICE

No..... Due 1939.

Receipt of Pledge

I hereby acknowledge receipt of those certain pledge agreements and pawn-tickets described in that certain contract executed on the 2 day of March, 1939, by and between the undersigned, and Sol Zemansky, Dave Zemansky and Abe Zemansky, doing business as the Provident Loan Association, State Loan Office, and Zemansky Brothers, in accordance with and pursuant to the terms of the said Agreement.

(Testimony of Sol Zemansky.)

Trustee's Exhibit No. 5 (Continued)

Dated: This 2 day of March, 1939.

SAM KLEINMAN

Sam Kleinman

Receipt

The undersigned, Sol Zemansky, Dave Zemansky and Abe Zemansky, doing business as the Provident Loan Association, State Loan Office, and Zemansky Brothers, hereby acknowledge that they have received from Sam Kleinman, the temporary custody of those certain pledge agreements and pawn-tickets described in that certain contract executed on the 2 day of March, 1939, by and between the undersigned and Sam Kleinman, for the limited purpose of using the same in accordance with the requirements of the aforesaid agreement.

It is understood that said pawn-tickets will be kept separate apart from pawn-tickets belonging to the undersigned, and will not be commingled in any way with other pawn-tickets.

Dated: This 2 day of March, 1939.

SOL ZEMANSKY, DAVE

ZEMANSKY and ABE

ZEMANSKY, doing business

as the PROVIDENT LOAN

ASSOCIATION, STATE

LOAN OFFICE and

ZEMANSKY BROTHERS

By: ABE ZEMANSKY

(Testimony of Sol Zemansky.)

Mr. Laugharn: I think all the rest are the same.

Mr. Dienstag: Yes.

The Referee: I would rather not do that. Somebody may insist that you keep all these in the record. The next one I see here is the contract dated March 22nd, covering \$2,510. Now, is it your understanding, gentlemen, that including that contract and from there on, they are all in the same form?

Mr. Dienstag: Yes, your Honor.

The Referee: All right. Trustee's Exhibit 6 by reference, copy of the contract dated March 22, 1939, covering the loan of \$2,510, attached to the Kleinman claim. Are you all then willing to stipulate that all subsequent contracts are in the same form as Trustee's Exhibit No. 6 by reference?

Mr. Dienstag: Yes, your Honor.

Mr. Laugharn: So stipulated. [91]

TRUSTEE'S EXHIBIT No. 6

(By Reference)

This Agreement, made this 22 day of March, 1939, by and between Sol Zemansky, Dave Zemansky and Abe Zemansky, individually, and doing business under the fictitious firm names and styles of Zemansky Brothers, and the Provident Loan Association, and the State Loan Office, hereinafter re-

(Testimony of Sol Zemansky.)

ferred to as "First Parties", and Sam Kleinman, hereinafter referred to as "Second Party",

Witnesseth:

Whereas, First Parties are now engaged in the business of pawnbroking and have in their possession pawn-tickets executed by lenders of money from First Parties; each ticket being distinguished by a certain serial number and being entitled "Provident Loan Association", and

Whereas, First Parties desire to borrow the sum of Twenty-Five Hundred and Ten Dollars (\$2510) from Second Party, and

Whereas, First Parties desire to pledge the above described pawn-tickets to Second Party as security for payment of the said loan, as is more fully hereinafter set forth, and

Whereas, Second Party is willing to loan said Twenty-Five Hundred and Ten Dollars (\$2510) to First Parties on the terms and conditions hereinafter set forth.

Now, Therefore, it is hereby mutually agreed by and between the parties hereto as follows, to-wit:

First: First Parties do hereby agree to make, execute and deliver to Second Party, one promissory notes in the amount of Twenty-Five Hundred and Ten Dollars each, in the amount of Twenty-Five Hundred and Ten Dollars, all in the manner and form of the notes attached hereto and made a part hereof;

Second: First Parties agree to transfer and de-

(Testimony of Sol Zemansky.)

posit by way of a pledge with Second Party, as collateral security for the payment of each and all of said promissory notes, and as security for the payment of all interests, costs, expenses and fees that may accrue thereon, the pledge-agreements and pawn-tickets, the numbers of which are contained in "Exhibit A" attached thereto and made a part hereof, which are now in the possession of First Parties; and First Parties do hereby warrant that every pawn-ticket and the representations thereon with respect to the property and loan amount for which said pawn-ticket was given is the result of a bona fide transaction, not subject to counter-claim or setoff of any kind or nature.

Third: In case of the non-payment of the said promissory notes, or the interest thereon, when due, according to the tenor thereof, First Parties do hereby appoint and constitute Second Party, his heirs or assigns, their attorney irrevocable, with power of substitution to sell, without advertising, at any time after any of said notes or interest thereon become due, with or without notice or demand, at the option of said Second Party, the whole or any part of said security, consisting of said pawn-tickets and such property which by the terms of Act 5826 of the Statutes of California, 1935, page 1613, has become the property of the First Parties and which has become the property pledged to the Second Party by First Parties by virtue of this agreement in place and in stead of the pawn-ticket representing the rights in such property, either at public

(Testimony of Sol Zemansky.)

or private sale, at his discretion; and to deliver the same to the purchaser or purchasers; and the proceeds to be applied to the payment of said promissory notes or note, interest due, attorney's fees, and other expenses accruing thereupon, and any surplus after payment of said note, interest, and expenses to be paid to First Parties, or their representative upon demand. And First Parties do hereby agree to pay on demand to said Second Party, his heirs or assigns, whatever deficit may result after applying the net proceeds of each sale to payment of said principal, expenses, and attorney's fees. Should any such sale be made, Second Party, or his assigns, directly or in the name of any other person, shall have the right to purchase;

Fourth: Second Party does hereby appoint First Parties, his agent, and First Parties do hereby agree to act as agent for Second Party, without charge to Second Party, for the purpose of collecting any and all sums of money which may be due, owing, or unpaid upon and in respect to each of the said pawn-tickets, and pledge-agreements, and First Parties do hereby agree to collect such moneys and hold the same in trust for the purpose of applying such money so collected to the payment of the promissory notes hereinbefore described, and First Parties will, upon demand, so pay and apply said moneys to the payment of the said promissory notes;

Fifth: First Parties do hereby waive the provisions of Sections 3001, 3004, 3005 and 3006 of the Civil Code of the State of California;

(Testimony of Sol Zemansky.)

Sixth: In case suit or action be brought by Second Party to enforce the terms and provisions of this agreement or of any of said notes executed by First Parties, or in the event of a sale of the personal property herein pledged by First Parties, First Parties agree to pay reasonable attorney's fees incurred by Second Party in such suit, action, or sale;

Seventh: First Parties do hereby agree to retain in their possession every article pledged and pawned to them in respect to and by virtue of the foregoing pawn-tickets, and to deliver them to the owners thereof, or assignees of said owners, only upon redemption of said pawn-tickets by the payment of the same as provided in Section 3 of Statutes of California, 1935, Page 1613; and after the expiration of time limited by the terms of said Paragraph 3 of said Act, First Parties shall hold any such articles so pledged and pawned for the benefit of and to the order of Second Party.

Eighth: First Parties shall keep true and accurate books, records, and accounts respecting the articles pledged and pawned and collection of the moneys due upon the above described pawn-tickets, and all such books, records, and accounts shall be open to inspection by Second Party at all reasonable times:

Ninth: Neither this agreement nor any of the terms, conditions, nor covenants herein are deemed to nor shall the same be construed to mean that Second Party is a partner or joint adventurer with

(Testimony of Sol Zemansky.)

First Parties, but that the meaning and intent of this agreement is that Second Party is a lender, creditor and pledgor of First Parties;

Tenth: Nothing in this agreement contained shall be construed so as to prohibit the Second Party from bringing suit or action upon the within described notes to enforce the payment thereof in a proceeding separate and apart from any other rights which Second Party may acquire by reason of this agreement.

Eleventh: Waiver or modification in any one or more instances by the Second Party of any of the terms, covenants or provisions of this agreement shall not thereafter be deemed a waiver or modification thereof, the same nevertheless to thereafter remain in full force and effect.

Twelfth: The illegality of any provision of this agreement shall not affect the validity of any of the other provisions hereof.

Nothing in this agreement shall be construed to require the commission of any act contrary to law, and wherever there is a conflict between any provisions of this agreement and any material statute, law or ordinance contrary to which the parties have no legal right to contract, the latter shall prevail, and in such event, the provisions of this agreement affected shall be curtailed, and limited only to the extent necessary to bring the same *with* the legal statute, law or ordinance.

Thirteenth: The benefits and burdens of this

(Testimony of Sol Zemansky.)

agreement shall run, inure to and bind each of the parties hereto, his heirs, administrators and assigns.

In Witness Whereof the parties hereto have hereunto set their hands the day and year first above written.

SOL ZEMANSKY
DAVE ZEMANSKY
ABE ZEMANSKY

Individually and doing business
as the Provident Loan Associa-
tion, State Loan Office and Ze-
mansky Brothers,

First Parties
SAM KLEINMAN
Second Party

Exhibit A

Agreement of March 22, 1939

NOS. OF PAWN TICKETS AND FACE AMOUNTS

48503.....	\$200.00
48505.....	100.00
48513.....	75.00
48518.....	100.00
48530.....	60.00
48537.....	300.00
48538.....	90.00
48540.....	300.00
48542.....	75.00
48547.....	100.00
48563.....	50.00
48567.....	50.00
48569.....	100.00
48597.....	60.00
48603.....	150.00
48608.....	150.00

(Testimony of Sol Zemansky.)

Nos. of Pawn Tickets and Face Amounts—(Continued)

48626.....	100.00
48637.....	65.00
48638.....	60.00
48645.....	225.00
48651.....	100.00

Exhibit B

Copy of Notes

\$2510.00

Los Angeles, Cal., *Mach* 22, 1939

5 days after date, without grace, we promise to pay to the order of Sam Kleinman Twenty-Five Hundred and Ten Dollars, For Value received, with interest from date at the rate of 10% per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at 1407 Ege Cliffe Dri Los Angeles Calif. and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the Court may ad-judge reasonable as Attorney’s fees in said suit.

CAP.

No..... Due

Receipt of Pledge

I hereby acknowledge receipt of those certain pledge agreements and pawn-tickets described in that certain contract executed on the 22 day of March, 1939, by and between the undersigned, and Sol Zemansky, Dave Zemansky and Abe Zemansky, individually, and doing business as the Provident Loan Association, State Loan Office, and Zemansky

(Testimony of Sol Zemansky.)

Brothers, in accordance with and pursuant to the terms of the said Agreement.

Dated: This 22 day of March, 1939.

SAM KLEINMAN

Sam Kleinman

Receipt

The undersigned, Sol Zemansky, Dave Zemansky and Abe Zemansky, individually, and doing business as the Provident Loan Association, State Loan Office, and Zemansky Brothers, hereby acknowledge that they have received from Sam Kleinman, the temporary custody of those certain pledge agreements and pawn-tickets described in that certain contract executed on the 22 day of March, 1939, by and between the undersigned and Sam Kleinman, for the limited purpose of using the same in accordance with the requirements of the aforesaid agreement.

It is understood that said pawn-tickets will be kept separate and apart from pawn-tickets belonging to the undersigned, and will not be commingled in any way with other pawn-tickets.

Dated: This 22 day of March, 1939.

SOL ZEMANSKY, DAVE

ZEMANSKY and ABE

ZEMANSKY, individually, and
doing business as the

PROVIDENT LOAN ASSOCIA-
TION, STATE LOAN OFFICE
and ZEMANSKY BROTHERS.

By ABE ZEMANSKY

(Testimony of Sol Zemansky.)

Q. What was the basis for determining, if there ever was a basis for determining it, when a new contract would be made out?

A. I think Mr. Kleinman would say make a new contract and he had his dealings with my brother on that.

Q. Mr. Zemansky, whenever a new contract would be made out and those pledges had been given as security to Mr. Kleinman, and a customer would want to come in and redeem the pledge, would the same procedure be followed as was followed out on prior occasions?

A. The same procedure.

Q. And what was done with the money?

A. It went in the cash drawer.

Q. For what purpose was the money used?

A. In the general line of business.

Q. Was any of that money on the new contracts ever used or set aside in a separate account?

A. I don't recall anything like that.

Q. Was anything ever said to Mr. Kleinman as to where [92] that money was going?

A. Not by me.

Q. Did Mr. Kleinman ever make any of the redemption of pledges that had been given to him as security? A. I believe he did.

Q. What did he do with the money when he made those redemptions?

A. It went into the cash drawer.

Q. So whether Mr. Kleinman made the redemp-

(Testimony of Sol Zemansky.)

tion or any other loan clerk, the same procedure was followed, is that correct?

A. That is correct.

Q. Now, do you recall when it was that an attachment was levied on the business by Simons' Lunch Room people?

A. Sometime the early part of March.

Q. That was after the first security had been given to Mr. Kleinman, is that correct?

A. Yes. [93]

Q. By Mr. Chotiner: Mr. Zemansky, did you ever tell Mr. Kleinman that the Simons' Lunch Room people were going to sue and attach?

A. No.

Q. Was that subject ever discussed with Mr. Kleinman at any time prior to the attachment?

A. No.

Q. At any rate, did you discuss with Mr. Kleinman the fact that you owed the Simons' Lunch Room people some money?

A. I don't recall it.

Q. Did you tell Mr. Kleinman that Judge Pacht was keeping after you, in substance and effect, to make payments to the Simons' Lunch Room people?

A. That was after Mr. Kleinman had secured the collateral.

Q. How soon after was it as you can best recall it now?

A. Well, it would be immediately after the attachment.

(Testimony of Sol Zemansky.)

Q. And when was the attachment made?

A. Sometime the early part of March.

Q. Just as soon as the attachment was levied, there was a representative of the Sheriff's office in the Provident Loan Association, is that correct? [94]

A. That is correct.

Q. Mr. Kleinman was present also, is that right?

Mr. Wolver: That is objected to, your Honor, as purely leading and suggestive.

The Referee: Well, it does not do any harm to see what the facts are.

Mr. Wolver: If the witness testifies we have the facts. If counsel testifies the witness merely acquiesces and some facts might be true. The penalty of leading questions is that we have two or three statements.

The Referee: All right. Mr. Chotiner will try to get the facts and not ask leading questions.

Q. By Mr. Chotiner: Was Mr. Kleinman present at the time the representative of the Sheriff's office was there?

A. I believe he was in San Francisco at the time of the attachment. He came down afterwards.

Q. Did you have a conversation with Mr. Kleinman regarding the matter of an attachment levied by the Simons Lunch Room?

A. Yes, I talked to him long distance and he came back from San Francisco.

Q. After he came back from San Francisco,

(Testimony of Sol Zemansky.)

after your long distance call, did you have another conversation with him regarding it?

A. Several of them.

Mr. Wolver: May we at this time have the foundation. [95]

Q. By Mr. Chotiner: Where did the conversation take place?

A. I believe it was in the office of the Provident.

Q. How soon after the attachment was levied was it?

A. I believe it was within a day or two.

Q. Who was present?

A. That I don't recall.

Q. Do you recall anyone else was present at all?

A. I can't recall.

Q. What was the conversation?

A. It was in reference to getting the attachment removed.

Q. Tell us what you said and what Mr. Kleinman said.

A. Well, it is a very difficult thing just to explain what took place, except we went over to Judge Pacht's office, if I recall it, to see what we could do in the way of getting the attachment removed.

Q. Did Mr. Kleinman go with you?

A. I think he was along.

Q. Was there a conversation held with Judge Pacht in the presence of Mr. Kleinman.

(Testimony of Sol Zemansky.)

A. I believe there was.

Q. What was that conversation?

A. That was in reference to getting the attachment removed.

Q. What was said by the various parties? [96]

A. I can't recall what was said. We went there for one purpose, to get the attachment removed.

Q. Can you tell us in substance and effect what each of the parties stated?

A. Naturally they said they were not going to take it off.

Q. What did you or Mr. Kleinman say, if anything?

A. We tried to work out a deal to get them to remove the attachment.

Q. Did Judge Pacht ask you in the presence of Mr. Kleinman for the payment of the money that was owed to Simons Lunch Room?

A. I don't recall whether he did.

Q. Judge Pacht had been after you for some time to get you to pay that account, hadn't he?

Mr. Wolver: That is objected to as being incompetent, irrelevant, and immaterial.

The Referee: Sustained. I think it may be assumed that they ran an attachment and they asked for their money.

Q. By Mr. Chotiner: Did you say anything to Judge Pacht in the presence of Mr. Kleinman as to your ability to pay the money at that time?

A. He asked for it and I wasn't able to give it to him, so there wasn't much more to be said.

(Testimony of Sol Zemansky.)

Q. After that conversation took place there in Judge Pacht's office, did you have another conversation with Mr. [97] Kleinman, or with someone else in the presence of Mr. Kleinman, in which the subject of the Simons Lunch Room attachment was discussed?

A. Mr. Kleinman and myself had several conversations about that.

Q. What were those conversations?

A. Well, to try to work out a deal, how we could get that attachment removed.

Mr. Dienstag: May I ask for the time of those conversations and the place or places where they took place, and other persons present?

The Referee: If the witness is able to do it. Obviously, there was such a close association between these two gentlemen that I doubt whether the witness with any degree of accuracy could recite exactly where each specific conversation took place. The Court understands the record to be that all of these conversations took place more or less immediately after Mr. Kleinman returned from San Francisco while the attachment was pending.

Mr. Dienstag: I am particularly interested in the parties present, if the witness remembers. I think he should state whether or not he remembers.

The Referee: Perhaps we can clear it up along this line. How long was the attachment on, Mr. Zemansky?

A. I believe it was on there for two or three days.

(Testimony of Sol Zemansky.)

Q. Two or three days. During that time, how many [98] times would you say you talked to Mr. Kleinman about it?

A. Probably had about three conversations.

Q. And outside of the Provident Loan office and Judge Pacht's office, do you recall any other place now where you met him and talked to him?

A. I don't recall.

Q. Don't you recall any other place? Of course, you walked back and forth, didn't you, on the street, going from your place to Judge Pacht's office?

A. That is right.

Q. Do you remember at any of those conversations that we are now talking about, anyone else participating in the conversation or being present?

A. I don't recall who was present other than Mr. Kleinman and myself.

Q. Were any of your brothers in on it?

A. I don't believe they were.

Q. You don't think they were. Or any of your employees of Provident Loan or any other associates of yours of Provident Loan?

A. I can't recall any other one.

Q. You can't recall anyone else.

A. No.

The Referee: I think that is the difficulty. The witness can't give us the foundation.

Q. By Mr. Chotiner: Now, will you tell us what the [99] conversations were with Mr. Kleinman?

A. We are right back where we were before.

(Testimony of Sol Zemansky.)

We were trying to work out a deal, how to get the attachments removed.

Q. Did you finally come to some conclusion with Mr. Kleinman regarding that subject matter?

Mr. Wolver: That is objected to as calling for the conclusion of the witness.

Q. By Mr. Chotiner: Mr. Zemansky, can you tell us now in substance or effect what you said and what Mr. Kleinman said?

A. We decided that the only way we were going to get anywhere was to try and secure them.

Q. What did Mr. Kleinman say about that subject, if anything?

A. He thought that was probably the best thing to do.

Q. Did you discuss with Mr. Kleinman where you were going to get the security to give the Simons Lunch Room people? A. Yes.

Q. Where was that discussion held?

A. That was in the office of the Provident Loan Association.

Q. When was that?

A. During the period of time the attachment was on the place. [100]

Q. What was said regarding that subject——
(Interruption)

The Referee: Go ahead.

The Witness: What was the question?

Q. By Mr. Chotiner: You are being asked now what was said about the manner in which you would secure Simons?

(Testimony of Sol Zemansky.)

A. We would secure them by those loans.

Q. Was anything said as to what loans were going to be used? A. Yes, there was.

Q. What was said?

A. Mr. Kleinman said we could use some of his loans in order to expedite the matter and get the Sheriff out of the place.

Q. Did you do that?

A. I believe that was done.

Q. By Mr. Chotiner: Had you ever asked Mr. Kleinman's advice regarding financial matters concerning the company prior to the giving of the first security to him? [101]

Mr. Dienstag: That is objected to on the ground that it has been asked and answered once before, and the witness stated he had not discussed the financial affairs with Mr. Kleinman.

The Referee: Overruled. Proceed.

(Question read.)

A. No. [102]

Q. Did he assist in the handling of the pledges there during the consummation of the transaction whereby security was given to the Simons Lunch Room people? A. I think he did.

Q. What did he do, if anything?

A. He merely assembled the loans to the amount that we had agreed on, that Simons were to be secured with.

Q. And what did he do in the assembling of the loans?

(Testimony of Sol Zemansky.)

A. He took the loans out of the drawers in the vault and put them in a separate drawer.

Q. Where did Mr. Kleinman go, if any place?

A. I imagine he went home. [103]

Q. While this transaction was being consummated, did he come into the same room where you and Judge Pacht were?

A. No, he was in the front office, in a different office where the Simons were.

Q. At the time you went to Judge Pacht's office, the first time there, when you say Mr. Kleinman accompanied you, was the subject matter discussed in Mr. Pacht's office regarding the Gans account?

A. I am not certain as to that.

Q. Did you ask Mr. Kleinman to accompany you to Judge Pacht's office? A. Yes.

Q. When you asked him that what did Mr. Kleinman say, if anything?

A. He said he would be pleased to go with me.

Q. Why did you ask Mr. Kleinman to accompany you?

Mr. Wolver: That is objected to as calling for the conclusion of the witness.

The Referee: Overruled.

A. Well, he was associated with me in the business and I thought I could rely on him for some suggestion he might have to offer.

Q. Why did you ask him—(withdraw that)

When you had your telephone conversation with

(Testimony of Sol Zemansky.)

Mr. Kleinman, did you ask him to come back to Los Angeles? A. Yes. [104]

Q. What did Mr. Kleinman say to that, if anything?

A. He said, "Why don't you do the same with the Simons as you have done for me?"

Q. How was that?

A. I thought he said, "Why don't you do the same with Simon as you have done for me?" but I am not certain as to that.

Q. Why did you ask Mr. Kleinman to come back to Los Angeles?

A. I thought he might be able to assist me financially and we could straighten the matter out.

Q. Had you discussed this subject matter of the Simon attachment with any other employee of the business?

Mr. Wolver: That is objected to as being incompetent, irrelevant, and immaterial.

The Referee: Overruled.

A. Had I discussed it, no.

Q. By Mr. Chotiner: Did you ask any other employee to go with you to Judge Pacht's office?

A. No.

Mr. Wolver: That is objected to on the same ground.

The Referee: I don't think so. Overruled.

The Witness: No.

Q. By Mr. Chotiner: Had you asked any other

(Testimony of Sol Zemansky.)
employee for any suggestions as to how to handle the situation?

Mr. Wolver: The same objection, your Honor.

[105]

The Referee: Overruled.

A. No.

Q. By Mr. Chotiner: Now, did you ask Mr. Kleinman to be at the Provident Loan Association office the night that the security was given to the Simons Lunch Room people?

A. I can't recall that.

Q. Can you relate to the Court the circumstances under which Mr. Kleinman came over to the Provident Loan Association that night?

A. I can't recall.

Q. Can you recall whether he volunteered to come over or whether you asked him to come?

A. I could not recall that.

Q. Did anyone ask him in your presence to be there?

A. Not that I know of.

Q. Did Mr. Kleinman remain there until the transaction was completed with Judge Pacht?

A. I don't recall. [106]

Q. By Mr. Chotiner: Mr. Zemansky, did you ever ask Mr. Kleinman for any suggestions as to how you were going to work out your financial problem at the Provident Loan Association?

Mr. Wolver: That is objected to, your Honor, as assuming a fact not in evidence, that there was a financial problem.

(Testimony of Sol Zemansky.)

The Referee: Overruled.

Mr. Wolver: Also asked and answered.

The Referee: Overruled.

The Witness: What was the question?

(Question read.)

A. No.

Q. By Mr. Chhotiner: Did you ever ask his advice regarding that subject matter?

Mr. Wolver: The same objection.

The Referee: Overruled, [108]

A. No. [109]

The Referee: Overruled. The question, Mr. Zemansky, is who first broached the idea of Mr. Kleinman going to the Union Bank and borrowing money, which in turn he would loan to you?

A. I believe Mr. Kleinman told me he would be able to get some money at the Union Bank.

Q. By Mr. Chotiner: When was it that he first told you he could get some money at the Union Bank?

A. It is very hard for me to fix the date.

Q. Well, was it before January of 1939, or after?

A. It is very hard for me to fix the date.

Q. Do you recall, Mr. Zemansky, for the purpose of refreshing your memory, was this money borrowed at the Union Bank sometime in March of 1938?

A. There is only one way I would be able to know, and that is by the bookkeeper.

(Testimony of Sol Zemansky.)

Q. Don't you recall at this time when it was that you borrowed some money from Mr. Kleinman, on which you were [110] only paying seven per cent interest?

A. I think the date of the note would fix it; that was when he got the money.

Q. Yes, but can you tell us what year that was in?

A. I don't know what year it was.

Q. Isn't it true that you borrowed \$2400 from Mr. Kleinman, which he told you he obtained from the Union Bank in March of 1938?

A. The only way I would be able to identify the transaction is the seven per cent interest was the money that is presumed to have come from the Union Bank. [111]

Q. By Mr. Chotiner: Can you tell us approximately how long before the attachment was levied that Mr. Kleinman told you he was borrowing money at the Union Bank?

A. The transaction in particular was, according to the attorney for Mr. Kleinman, made in 1938, of \$24,000.

Q. Now, then, at the time when the money was borrowed at the Union Bank, had there been a discussion with Mr. Kleinman regarding the condition of the cash drawer and available money to make loans with?

A. I don't recall any such conversation.

(Testimony of Sol Zemansky.)

Q. Why was the money borrowed at the Union Bank, if you know?

A. I assume I must have told him that we were short of money and he arranged to get the money for me. [112]

The Referee: Yes, all right. Mr. Zemansky, you recall the time, don't you, when Mr. Kleinman said he would go to the Union Bank and borrow some money and loan it to you? A. That is correct.

Q. Did that come about as a result of just one conversation with Mr. Kleinman, or was it a series of conversations over a period of time?

A. Well, as a rule, every time I asked Mr. Kleinman for anything he always gave whatever I asked, so it wouldn't take many conversations. [114]

Q. Well, how did it start?

A. Well, I amagine there was some rush need for the money. I said, "Sam, can you get me some money?" and he said, "I will see what I can do," and went down and got the money. I don't recall what I said I needed the money for.

Q. You don't remember? A. No.

Q. You mean to tell the Court you don't now recall any of the details of that conversation, except that Mr. Kleinman said he would go and get the money and loan it to you?

A. That was the way it was done.

Q. How often did Mr. Kleinman go and borrow money from some other source other than his own finances, and loan it to you?

(Testimony of Sol Zemansky.)

A. He loaned me a considerable amount of money at different times. I wouldn't know where he procured it except this one time when he went to the Union Bank to borrow it; otherwise, I never questioned him where he got the money. [115]

Q. You don't remember when it was?

A. It was prior to the date of the execution of that note.

Q. What is the date of that note, gentlemen, does anybody know?

Mr. Horn: The note of March, 1938, I believe.

Mr. Chotiner: March 25, 1938.

The Referee: Have you the note, gentlemen? You ought to have it. It is a canceled note, isn't it?

Mr. Laugharn: March 25, 1938.

Mr. Wolver: The note was \$19,000, according to that exhibit; then July 26th, \$3,000; March 26th, another \$2,000 note; calling your attention to Trustee's Exhibit No. 3, lines 29 to 30, inclusive.

The Referee: Was this item of \$19,000 on March 25th, 1938, a Union Bank transaction?

A. I couldn't say definitely about that.

Mr. Chotiner: That is one that bore seven per cent interest.

The Witness: All seven per cent interest was supposed to be from the Union Bank, as Mr. Kleinman did not want to charge me any more interest than what the Union Bank had been charging him. That is how I can identify the money. [116]

The Referee: I think we ought to complete our

(Testimony of Sol Zemansky.)

record. Trustee's Exhibit 6 by reference is a copy of the contract dated March 22, 1939, covering a loan of \$2,510, attached to the Kleinman claim, and then there is the stipulation that all subsequent contracts are in the same form. I think we should read into the record a list of the dates and the amounts of the subsequent contracts.

Mr. Wolver: Isn't that in the record, in our proof [117] of claim?

The Referee: I would like to have it stipulated that the items in your proof of claims are correct. Perhaps counsel will be unable to do that for the moment on account of that \$3,750. We are simply identifying the form of the contract. If there is no objection, I will read it into the record now, and then the reporter will have it.

Mr. Chotiner: We can check it against my list as we go along.

The Referee: I am going to read from page 3 of the claim. All subsequent contracts after that of March 22nd in the sum of \$2,510 are these: March 28th, \$2,000; March 31st, \$2,200; April 5th, \$2,000; April 3rd, \$2,500; April 8th, \$2,000; April 11th, \$2,200; April 13th, \$2,100; April 15th, \$2,200; April 18th, \$2,500; April 21st, \$2,000; April 24th, \$1,500; April 28th, \$2,500; May 2nd, \$1,200; May 9th, \$3,700; May 13th, \$2,000; May 25th, \$3,400; June 2nd, \$3,750; June 7th, \$3,400; June 23rd, \$3,900; June 28th, \$4,600; July 5th, \$2,400.

Q. By Mr. Chotiner: Mr. Zemansky, prior to

(Testimony of Sol Zemansky.)

the giving of the security to Mr. Kleinman, did you discuss your business with him? A. Yes.

Q. How often would you say that conversations took place? [118]

A. That is something I wouldn't know, but I had several conversations with him.

Q. And extending what period of time?

A. Oh, probably over a period of six or seven months.

Q. Prior to the time he obtained his security?

A. Yes.

Q. And who was present at those conversations?

A. Myself and Mr. Kleinman.

Q. Was anyone else ever present?

A. I don't recall.

Q. And where did those conversations take place? A. At the Provident.

Q. What were the conversations?

A. Just that we probably could do more business if we had more money.

Q. What did Mr. Kleinman say regarding that?

A. There wasn't anything said.

Q. Was that the extent of the conversation that you had with him on each one of those occasions?

A. Well, that is about the substance of it.

Q. What was your purpose in telling that to Mr. Kleinman?

Mr. Wolver: That is objected to, your Honor, as calling for the conclusion of the witness.

The Referee: Sustained.

(Testimony of Sol Zemansky.)

Q. By Mr. Chotiner: Why did you tell that to Mr. [119] Kleinman?

Mr. Wolver: The same objection.

The Referee: Sustained, unless you told Mr. Kleinman why you said those things; did you do that, did you explain that?

A. Yes, I told him we were refusing loans.

Q. By Mr. Chotiner: What did you tell him when you said you were refusing loans?

A. We could make more loans if we had more money.

Q. Was that the extent of the conversations regarding the subject of your refusing loans?

A. Well, you could talk a long time, but that was the principal substance of it.

Q. When you talked a long time, I am trying to find out, Mr. Zemansky, what was said as you can best now recall it.

A. Well, nothing other than if we had some more money we could make loans; we had to refuse loans that were coming in, that were being offered.

Q. Was anything said as to why you didn't have sufficient money to make loans?

A. No, there wasn't anything said at the time, that I recall.

Q. Did Mr. Kleinman ask you why you didn't have sufficient money to make more loans?

A. I don't recall that he did. [120]

Q. Was that subject matter discussed in any fashion whatsoever with him?

(Testimony of Sol Zemansky.)

A. No, nothing other than we were refusing business, it was really too bad we had to refuse business when we had such excellent opportunities to get the merchandise.

Q. At the time those conversations took place, was Mr. Kleinman still selling jewelry that was obtained by failure of redemption? A. Yes.

Q. And were there very many cases like that during that period of time where customers failed to redeem their property?

A. Well, there was always a certain amount of unredeemed pledges.

Q. Did that run to any great volume?

A. I couldn't say exactly; it was considerable.

Q. You say considerable; what do you mean?

A. I couldn't fix it in dollars and cents, because I don't know.

Q. When he would sell that jewelry, where did that money go?

A. That money was sent down to the Main Street store.

Q. Was anything said to Mr. Kleinman or did he say anything to you, after that money would come back in the cash drawer for the purpose of making loans, as to whether there was still sufficient money to make loans? [121]

A. I don't recall anything like that.

Q. At the time that you first gave security to Mr. Kleinman, did your liabilities exceed your assets?

(Testimony of Sol Zemansky.)

Mr. Wolver: That is objected to, your Honor, unless he knew at that time. I believe the rule is whether or not he knew it at that time, not at some subsequent discovery.

The Referee: We are not now asking about the effect on Mr. Kleinman. The question goes to the question of solvency at the time the security was given. I don't think it would make any difference whether the witness then knew the ratio of assets to liabilities, or whether he discovered them later. It was one of the difficulties of this business. Overruled. You may read the question.

(Question read.)

A. Well, I did not know.

Q. By Mr. Chotiner: Did you ever know?

A. Not until the bankruptcy.

Q. When you say "not until the bankruptcy," do you mean at the time you filed your petition for arrangement under Chapter 11?

A. That is correct.

Q. Was that the first time that you ever knew that your liabilities exceeded your assets?

A. That was about the first time.

Q. When you say that was about the first time, can you [122] tell us when was the first time that you knew your liabilities exceeded your assets?

A. Well, I never knew definitely insofar as there was no way for me to determine it.

Q. When did you first find out that your liabilities exceeded your assets?

(Testimony of Sol Zemansky.)

A. The only time I could say was when people were pressing me for money, I didn't have enough money to pay them off at one time.

Q. When did they start pressing you for payment?

A. Probably six months or so of the petition.

Q. Did anyone press you for payment prior to six months before filing your petition?

A. Yes, I had people pressing me, but I was always able to take care of the obligations.

Q. Did you have sufficient money on hand with which to pay your obligations when they pressed you for payment?

Mr. Wolver: That is objected to as being incompetent, irrelevant, and immaterial, not proof of solvency or not. It is in the State Court, but not in this Court.

The Referee: Overruled.

Q. By Mr. Chotiner: Did you have money on hand to meet obligations when you were pressed for payment at a period prior to six months before the filing of your petition? A. Yes. [123]

Q. Where did you get the money to meet those obligations?

A. Just refused loans, refused loans in the loan department.

Q. By Mr. Chotiner: Do you know approximately what the total of your obligations was, of Zemansky Brothers, at the time the security was given to Mr. Kleinman? A. I didn't know.

(Testimony of Sol Zemansky.)

Q. Was it more than \$100,000?

A. I didn't know the figures at the time.

Q. Was it more than \$100,000, Mr. Zemansky?

A. I imagine it was more than \$100,000, because Mr. Kleinman's claim was \$100,000.

Q. Was it more than \$500,000?

A. I don't know the figures.

Q. Can you approximate what the figures were?

A. No, I could not approximate them. [124]

Q. By Mr. Chotiner: Did you ever discuss with your brother, David Zemansky, the amount of money that was being paid as interest to your creditors?

Mr. Wolver: That is objected to, your Honor.

Mr. Chotiner: It calls for a yes or no answer.

The Referee: Overruled. Did you talk to your brother Dave about the interest?

A. I don't recall.

(At this point, there was a discussion between Court and counsel as to adjournment.)

Mr. Chotiner: There is one thing, before I forget it, [126] and that is that the attachment by the Simons Lunch Room people was levied on February 27, 1939. [127]

By Mr. Chotiner:

Q. Mr. Zemansky, at the time you filed your petition under Chapter 11, you were aware of the total liabilities of Zemansky Brothers, isn't that correct?

A. Yes sir.

(Testimony of Sol Zemansky.)

Q. Was there any substantial change in the amount of those liabilities within a period of one year prior to the time you filed your petition?

A. I don't believe there was any material difference.

Q. And at the time the petition was filed, you were familiar with the amount of the assets of Zemansky Brothers, isn't that correct?

A. Approximately.

Q. Was there any substantial change so far as the assets were concerned within a year of the time prior to the filing of the petition?

A. I don't believe there was any material difference.

Q. And the schedule that you filed at the time or shortly after the time that the petition itself was filed, [128] is a true and correct statement of the liabilities and assets of Zemansky Brothers, isn't that correct?

A. That is correct.

Mr. Chotiner: At this time, if your Honor please, we offer as Trustee's exhibit next in order by reference the schedules of Zemansky Brothers.

The Referee: Only one set of schedules filed, any amendments or anything?

Mr. Laugharn: I don't think there were any amendments. If there were, we might include them.

Mr. Chotiner: Whatever there may be.

The Referee: Trustee's Exhibit 7 by reference, debtor's schedules and amendments, if any, as filed herein. [129]

Q. By Mr. Chotiner: I will now show you,

(Testimony of Sol Zemansky.)

Mr. Zemansky, a form here headed Provident Loan Association, which bears a number, 52,508, and ask you what that is and what it represents.

A. That is a document that we used at the Provident in taking in loans from a party.

Mr. Chotiner: Now, we ask that this be marked, if the Court please, as Trustee's exhibit next in order, in evidence. We will connect it up so far as the transaction is [130] concerned.

Mr. Dienstag: May I suggest that it be marked for identification rather than in evidence until the foundation is laid for putting it in?

The Referee: I understand this is merely a specimen.

Mr. Dienstag: Mr. Chotiner said in evidence.

Mr. Chotiner: Simply a specimen.

Mr. Dienstag: All right, no objection.

The Referee: However, let's establish the fact, if it is a fact, that this particular form was used at all times during the Kleinman transactions.

Mr. Chotiner: Very well.

Q. Mr. Zemansky, do you know when it was that the Provident Loan Association first started using this form of pledge ticket?

A. I believe it was sometime after March of 1939.

Q. After March of 1939?

A. You could verify the exact date by the printer, if you had to.

Q. Do you know what number was first used when you started using this form?

(Testimony of Sol Zemansky.)

A. I don't know. I believe it was 50,000, but I am not certain as to that.

Q. At any rate, after March of 1939, this was the form that was used whenever loans would be made to customers, is that correct? [131]

A. That is correct.

Q. Now, will you describe or tell the Court what was done with the portion entitled "Provident Loan Association," and which is the longer or the longest piece of this triplicate ticket?

A. That is the part of the ticket that the customer received.

Q. What was done with the two duplicate slips?

A. One was put on our file with the signature and the other, I believe, was turned over to Mr. Kleinman.

Q. When you say that the other one was turned over to Mr. Kleinman, when was it turned over to him with relation to the time that the pledge was made by the customer?

A. I am inclined to believe that when the pledges were turned over, the stub was turned over to him, and that followed every time there was a new bunch of loans accumulated.

Q. Was the stub turned over to Mr. Kleinman at the time that the pledge was made by the customer?

A. That is something I don't know, because I never handled the transaction directly with him.

Q. Who handled this transaction directly with him, if you know?

(Testimony of Sol Zemansky.)

A. I think it was Mr. Kravitz or my brother Abe. I am not sure which one.

Q. Where were the stubs kept at the place of business? [132]

A. In the loan department room.

Q. Where was that?

A. In the Provident, right in the room where the cash drawer was located.

Q. Then the stubs were placed in a box and kept in the cashier's cage, is that correct?

A. That is correct.

Q. Whenever the stubs were turned over to Mr. Kleinman, from what source did those stubs come, if you know?

A. I don't know.

Q. Then I take it that you didn't handle any of those transactions yourself, is that correct?

A. I handled none of them myself.

Q. The second duplicate stub was kept in your files there at the Provident, is that correct?

A. That is correct.

Q. Now, was there any segregation made of the stubs representing pledges that were given to Sam Kleinman for security from the other stubs which had not been given to Mr. Kleinman for security?

A. I think they were all kept together.

The Referee: Were there objections to this?

(No response.)

The Referee: This will be marked Trustee's Exhibit No. 8.

(Testimony of Sol Zemansky.)

Q. Now, prior to the time that you started using the [133] form of pledge ticket beginning with No. 50,000, what was the form of the pledge ticket?

A. Just the ticket and the stub.

Q. By Mr. Chotiner: Did the Provident Loan Association or Zemansky Brothers ever send any notice to any of its customers that their pledges had been given to Mr. Kleinman as security?

A. No.

Q. Were any notices of any kind sent to those customers regarding that subject matter?

A. No.

Q. Who made collection on those pledges?

A. Any of the employees of the place.

Q. Now, then, will you explain to the Court what would be done whenever a customer failed to redeem the pledge within the time allowed?

A. We would generally send them an interest notice at three months, then nine and twelve months, notifying them that interest was due, and at the end of that time, if [134] we needed the merchandise, we would pull out the pledge as expired.

Q. What do you mean when you say you pulled out the pledge?

A. Well, we would look at the stub, see that no interest was paid on the pledge, and took the pledge and put it in with the merchandise.

Q. Would you dispose of the pledge or pull the pledge as you have termed it without taking into consideration the ticket or the stub that you had?

(Testimony of Sol Zemansky.)

A. We always referred to the stub.

Q. What description, if any, was placed on the stub, so far as the merchandise was concerned?

A. Just the usual description of the article.

Q. Was any description of the merchandise placed on the customer's portion of the ticket?

A. No.

Q. Well, wasn't any description of any kind put on there?

A. Well, we would write on the customer's portion whether it was a watch or a ring. That's as far as we needed to describe it, except that it was an accurate description.

Q. Will you explain to the Court what you mean when a pledge has expired?

A. Well, at the end of 12 months the pledge was [135] forfeited to us. That is the way the law operated. We generally held them over 13 months ourselves.

Q. I will now show you an envelope and ask you what that is.

A. That is a container which we used to put the pledge in.

Q. And is that the form of envelope that was used by the Provident Loan Association during all of the time of your transactions with Sam Kleinman?

A. Wherever the article was not capable of being put in the bag, it was wrapped up in paper.

Mr. Chotiner: I ask that this be marked as Trustee's exhibit next in order in evidence.

(Testimony of Sol Zemansky.)

The Referee: Trustee's Exhibit No. 9.

Q. By Mr. Chotiner: What was the name that was used for that envelope?

A. Just a bag, that is all, a pledge bag.

The Referee: What do you call it?

The Witness: A pledge bag.

Q. By Mr. Chotiner: Will you describe or explain to the Court what the information that is printed on the pledge bag represents?

A. The first line would be the number of the pledge.

Q. From what would you obtain that number?

A. From the stub.

Q. That is the pledge ticket stub that you refer to? [136]

A. That is right. The second line is the amount of the loan.

Q. Where did you obtain that information?

A. From the stub. The third line would be the interest, and on this line would be the date the loan was taken out.

Q. When you say "on this line," you are referring to the fourth line; it has no printing on it? A. That is correct.

Q. What was placed on that line?

A. The date of the pledge.

Q. Where did you obtain that information?

A. From the stub.

Q. Would you dispose of the contents of the pledge bag without considering the stub?

A. No.

(Testimony of Sol Zemansky.)

Q. Would you dispose of the stub without taking into consideration the pledge bag and the merchandise contained in it?

A. I don't quite get your idea, disposing of the stub.

Q. Well, would anything be done with the stub, so far as canceling without considering the pledge bag?

A. The only time the stub would be canceled would be in event of a redemption.

Q. When that would happen, what would you do with the pledge bag and its contents?

A. Deliver it to the customer. [137]

Q. Now, after the security had been given to Mr. Kleinman, did all of the clerks of the Provident Loan Association have access to those pledges?

A. I believe so.

Q. Well, if a customer would come in and want to pay interest or redeem a pledge, which was one that had been given to Mr. Kleinman for security, were any of the loan clerks allowed to handle the transaction? A. Yes.

Q. Do you know Mr. Leo Kravitz?

A. Yes.

Q. He was a loan clerk there, is that correct?

A. That is correct.

Q. Do you know Mr. Robert Sego?

A. Yes.

Q. Was he a loan clerk at the Provident?

A. Yes.

Q. Mr. Abraham Zemansky was your brother?

(Testimony of Sol Zemansky.)

A. Yes.

Q. Was he working there at the Provident Loan Association? A. Yes, he was.

Q. Did all of those individuals just named, Leo Kravitz, Robert Sego, and Abraham Zemansky handle any of the pledges, insofar as the payment of interest or redemptions were concerned, when those pledges had been [138] given to Mr. Kleinman as security? A. Yes sir.

Q. Did you handle any of those?

A. I don't believe I ever handled any of them.

Q. Whenever any of the clerks would go into the vault for the purpose of handling one of the pledges, for the purpose of receiving interest payments or redemptions, did Mr. Kleinman go with the clerk at the same time?

A. I don't believe so.

Q. Did Mr. Kleinman have a key to the boxes which contained the pledges that had been given to him as security?

A. Why, I believe that worked this way, Mr. Chotiner. There was a key that unlocked a certain section of all the boxes, and that key was in a drawer, and they would have access to the vault and have access to that key. They picked up the key and went in and unlocked the boxes.

Q. Did all of the clerks have access to the safe key?

A. All the loan clerks had access to it.

Q. That key was kept in this drawer for the use of all the loan clerks?

(Testimony of Sol Zemansky.)

A. Some of them had it on their key ring, but there was an extra key in the drawer.

The Referee: Let us have some evidence at this time, if you don't mind, as to who had access to the vault itself.

Q. By Mr. Chotiner: Who opened the vault in the [139] morning, Mr. Zemansky?

A. Mr. Kravitz.

Q. Mr. Kravitz. Was Mr. Kleinman required to be present at the time the vault would be opened?

A. No.

Q. Was he present whenever the vault would be opened?

A. He had no regular hours in the morning when he would get there.

Q. Did anyone else have access to the opening of the vault?

A. It was generally opened by Mr. Kravitz.

Q. Did anyone else have access to the combination?

A. We all had the combination of the vault.

Q. When you say "all," you refer to whom?

A. The three brothers.

Q. Did Mr. Kleinman have the combination to the vault? A. I don't believe he did.

Q. When was the first time that the subject of giving security to Mr. Kleinman was discussed?

A. I believe it was the latter part of 1938 or the early part of 1939.

Q. Did Mr. Kleinman tell you why he wanted security?

(Testimony of Sol Zemansky.)

A. He said he was obliged to go away on a vacation, if I recall, and would like to be secured. That is the substance of the conversation.

Q. Did he give any other reason as to why he wanted [140] security?

A. Yes, I believe there was another reason.

Q. What reason did he give?

A. I think he said at that time he thought he would be in a position to secure some more money at the Union Bank at that time.

Q. Did Mr. Kleinman say anything about the fact that he would feel better about it if he had security?

A. Yes, he said he would feel better while he was away on his trip.

Q. What did he say in regard to that subject matter, if there was anything else said?

A. That was just about all that was said.

Q. Did Mr. Kleinman say anything as to why he would feel better about it if he had security?

A. He didn't say.

Q. Did you say anything to him about whether it was necessary for him to have security?

A. No, I don't believe I did. [141]

Mr. Chotiner: So there won't be any doubt about the record, at the time you first discussed this subject with Mr. Kleinman, did you have any other creditors? A. Yes.

Q. There were quite a number of them?

A. Yes.

(Testimony of Sol Zemansky.)

Q. By Mr. Chotiner: Did any of the other creditors have security at that time? A. Yes.

Q. Which creditors?

A. I believe Wulfson and the Citizens National Bank. [142]

Q. By Mr. Chotiner: Mr. Zemansky, did Mr. Kleinman ever say anything to you regarding the subject matter of the Wulfson and the Citizens Bank having security?

Mr. Dienstag: I object on the ground that it has been asked and answered.

The Referee: Overruled. Read the question.

(Question read.)

A. I don't recall any conversation about it.

Q. By Mr. Chotiner: Did Mr. Kleinman know that the Wulfsons and the Citizens Bank account were secured, if you know?

Mr. Wolver: That is objected to as a conclusion of the witness.

The Referee: He said, if you know. Overruled.

The Witness: If I knew?

Mr. Chotiner: Will you read the question? [143]

The Referee: Let us put it this way. Do you know of your own knowledge that Mr. Kleinman knew of the security held by the Wulfsons and the Citizens National Bank?

Mr. Wolver: May our objection be noted to the Court's question on the same ground, that it calls for the conclusion of the witness?

The Referee: Certainly.

Mr. Wolver: And on the ground that one man

(Testimony of Sol Zemansky.)

can never know what another man knows unless he has examined an instrument or participated in the conversation or has discussed with him.

The Referee: Overruled. Do you understand the question?

The Witness: Yes, I understand the question. He may have known about those pledges.

Mr. Wolver: I am going to ask that that be stricken on the ground it is a conclusion and conjecture.

The Referee: Yes, it may go out. Proceed.

Q. By Mr. Chotiner: Where were the pledges kept that had been given to Wulfson and the Citizens Bank as security?

Mr. Dienstag: That is objected to on the ground that it is incompetent, irrelevant, and immaterial, and has no bearing upon the issues in this case.

The Referee: Overruled.

The Witness: The Citizens National Bank pledges were [144] kept at the Citizens National Bank branch between 7th and 8th on Hill.

Q. By Mr. Chotiner: Where were the Wulfson pledges kept?

Mr. Wolver: The same objection.

The Referee: Overruled.

A. The Wulfson ones were originally, I believe, at the 5th and Spring Street Branch, and later transferred to the 7th and 8th Street Branch on Hill Street, of the Citizens National Bank.

Q. By Mr. Chotiner: Whenever a customer would come in the Provident Loan Association and

(Testimony of Sol Zemansky.)

wanted to redeem a pledge that had been given either to Wulfson or the Citizens Bank as security, what was the procedure followed in effecting that redemption?

Mr. Wolver: That is objected to as being incompetent, irrelevant, and immaterial, and not binding on the claimant.

The Referee: Overruled. I take it, this is all preliminary.

Mr. Chotiner: Yes, we will connect it up with Mr. Kleinman.

The Witness: They would take the amount of the money——

Q. By Mr. Chotiner: Who would take the amount of the money?

A. The loan clerk Mr. Kravitz generally would handle those transactions, and go down and pay the Citizens Bank [145] the money, receive the pledge and then deliver it to the customer.

Q. Did Mr. Kleinman ever go to the Citizens Bank and handle one of those redemptions?

A. I don't believe he did.

Q. Would you say definitely that he did or did not?

Mr. Wolver: That is objected to, your Honor, as being incompetent, irrelevant, and immaterial, and cross-examination of the questioner's own witness.

The Referee: Overruled.

Mr. Wolver: Leading and suggestive.

The Referee: Overruled.

(Testimony of Sol Zemansky.)

A. I can't recall of him ever having gone and getting any of those loans.

Q. By Mr. Chotiner: Did you ever have a discussion with Mr. Kleinman regarding the subject matter as to where the pledges were to be kept that were going to be given to Mr. Kleinman as security?

A. Yes, there was a conversation with reference to that.

Q. What was that conversation?

A. Mr. Kleinman, I believe, wanted a safe in the front office that he occupied to keep the loans in there. That was one of his ideas.

Q. What did you say to that?

A. I told him I didn't believe that it was necessary. [146]

Q. Give us the rest of the conversation, if there was any.

A. That is about all there was to the conversation.

Q. During that conversation, was there anything said about the Wulfson and Citizens Bank pledges being kept at the Citizens Bank?

Mr. Wolver: That is objected to as being compound and also already asked and answered.

The Referee: Overruled.

A. I don't recall any conversation about that.

Q. By Mr. Chotiner: Directing your attention to February 24, 1939, and to Trustee's Exhibit No. 4, being the contract dated February 24, 1939, are you familiar with that contract? A. Partially.

(Testimony of Sol Zemansky.)

Q. Will you explain to the Court where you were when that contract was signed?

A. In San Francisco.

Q. And who prepared that contract, if you know?

A. I believe it was prepared by Mr. Dienstag.

Q. And had the contract been signed by anyone prior to your signing it? A. No.

Q. And who presented the contract to you in San Francisco?

A. Well, I believe I received a call one morning [147] when I was at the St. Francis Hotel. Mr. Dienstag phoned me and told me he was in town and wanted to know if I would come down to his office, so I went down to his office and signed the contract.

Q. Did Mr. Dienstag tell you where he had just come from?

A. Well, he had been in Los Angeles.

Q. Did he tell you that?

A. I saw him the day before in Los Angeles.

Q. When you saw Mr. Dienstag in San Francisco, did you have any conversation with him regarding the signing of the contract?

A. No, there wasn't any conversation.

Q. Wasn't anything said?

A. He just asked me to drop down to his office and sign the contract, and I read it through and I signed it.

Q. Did you have any conversation with Mr. Dienstag in Los Angeles prior to signing the contract in San Francisco? A. Yes, we discussed it.

(Testimony of Sol Zemansky.)

Q. Who was present at that conversation?

A. I don't recall.

Q. Would you say there were other people present besides yourself and Mr. Dienstag?

A. I would say Mr. Kleinman, Mr. Dienstag and myself.

Q. What was that conversation?

A. He just merely told me he was preparing the contract. [148]

Q. Was there anything said regarding the subject matter of Mr. Kleinman obtaining the security or otherwise he would not have left his money there?

Mr. Wolver: That is objected to as leading and suggestive. We have no objection to the conversation, but where counsel——

The Referee: It is leading. It will be sustained.

Q. By Mr. Chotiner: Did Mr. Dienstag demand that the contract be executed giving security to Mr. Kleinman?

Mr. Wolver: That is objected to, your Honor, on the ground that it is a conclusion of the witness, also assuming facts not in evidence, that he demanded.

The Referee: Mr. Zemansky, don't you remember the substance of that conversation? It was a rather unusual conversation, deciding the course of your business, wasn't it?

A. The whole thing was that they asked for security, they drew the contract and I signed it. That's about the substance of it.

Q. Of course, Mr. Chotiner is trying to find out from you what, if anything, they said as to why they

(Testimony of Sol Zemansky.)

wanted the security. Isn't that what you are trying to bring out at this time?

Mr. Chotiner: Yes, your Honor.

Q. By the Referee: Can't you reflect a bit and see if you cannot remember what, if anything, they said on that [149] subject?

A. I believe I explained to Mr. Kleinman at the time about the contract for security. He said he wanted to go away on a vacation and he would feel a lot better if he were secured. That's about the whole substance of the conversation.

Q. Well, now, we are trying to find out what else, if anything, was said on the subject at the time Mr. Dienstag sat in on the conversation in Los Angeles.

A. Other than he was going to prepare the contract, he told me what he had in mind, and that on that basis Mr. Kleinman would be able to procure more money at the Union Bank.

The Referee: All right. Proceed.

Q. By Mr. Chotiner: Mr. Zemansky, do you know whether Mr. Dienstag is a relative of Mr. Kleinman?

Mr. Wolver: We will stipulate that he is the son-in-law of Mr. Kleinman, that he is married to the daughter of Mr. Kleinman.

Mr. Chotiner: The materiality will be evident very shortly.

Q. Did Mr. Dienstag, in this conversation with you in Los Angeles prior to the contract being executed, have a conversation with you in which the operation of the business was discussed in any way?

(Testimony of Sol Zemansky.)

A. I don't recall. [150]

Q. Was there any conversation regarding whether you would be able to conduct it, stay in business?

A. I don't recall any conversation.

Q. Now, the fact that you are smiling at this time, Mr. Zemansky, does that refresh your memory as to any of that subject matter being discussed?

A. No.

Q. Was anything said at that time about Zemansky Brothers confining their efforts to the pawnbroker business?

A. I can't recall anything like that.

Q. As a matter of fact, you did discuss with Mr. Dienstag, or at least a conversation was held regarding whether or not the Provident Loan Association could continue to exist in business and make a profit in view of its financial condition?

Mr. Wolver: That is objected to as leading and suggestive. It is not a question asking for any statement, but asking for information.

Mr. Dienstag: Further, and an attempt to impeach his own witness. The witness has just stated he didn't remember that conversation. Mr. Chotiner is insisting that he did.

Mr. Chotiner: If the Court please, I think it must be apparent to the Court that here is a situation where people were engaged in the pawnbroking business, and while it is true there were two creditors, Wulfson and the Citizens [151] Bank, that had security, it is apparent it was an unusual situation where a person, a creditor to the extent of approxi-

(Testimony of Sol Zemansky.)

mately \$100,000, and security was being asked for, in a very casual way would state that he was going away on a vacation and would feel better about it if he had security. Now, frankly and quite obviously, I think it must be apparent that there must have been some definite object in this matter, particularly since Mr. Zemansky said the subject was first broached in the latter part of 1938 or the first part of 1939, and the contract is not executed until February 24, 1939. Now, obviously, there must have been some discussion regarding the situation rather than just a mere casual observance that they wanted security and were going to get it, particularly since Mr. Kleinman was more than, you might say, just loan clerk. He had access to the cash book at all times and the cash drawer and had talked with Mr. Zemansky that there was not sufficient money with which to make loans; when big loans were requested they did not have enough money to make them; that he had gone to the Union Bank and had borrowed money, which money had found its way into the business. Surely, there must have been more conversation, and I think, very frankly, the witness' memory is a little hazy at this time. I think it is quite apparent that we have the right to ask leading questions where a witness appears to be an unwilling witness on very important matters. [152]

Mr. Dienstag: As to the last part of Mr. Chotiner's statement, that the witness is unwilling, I don't know whether that is true or not. I haven't examined

(Testimony of Sol Zemansky.)

this witness before this time to find out whether he is unwilling. It appears to me the only basis for Mr. Chotiner's statement is that this witness is not telling Mr. Chotiner what Mr. Chotiner wishes this witness to tell in order to satisfy Mr. Chotiner. I say to your Honor that it is not the fault of the witness or that he is an unwilling witness. The witness is simply stating what happened and what he remembers. Mr. Chotiner has made several other statements in the course of his discussion to your Honor, a good many things which are not in evidence here, and painting a picture that Mr. Chotiner fails to bring out by evidence in this case, and stating that because he is unable to bring it out that he is having difficulty. I submit that the witnesses who are offered here by the Trustee, or you may say the plaintiff, shall not be led, shall not have the words placed in their mouths, simply because the attorney for the Trustee wishes they would state certain facts.

Mr. Chotiner: I am going to represent to the Court at this time, that I had conferred with Mr. Zemansky on numerous occasions prior to this litigation now before the Court, and that the results of those conferences with him have been transcribed into a prepared statement, which I have, and which very frankly I am using for the purpose of [153] interrogating Mr. Zemansky. I might represent to the Court at this time that Mr. Zemansky has given me more information that he is now giving from the witness stand on the particular subject as to whether

(Testimony of Sol Zemansky.)

Mr. Kleinman knew the condition of the business there and the method and the manner in which that security was given to him.

The Referee: Gentlemen, the purpose of all of the rules of evidence is to bring out all of the facts in a proper and legitimate manner. I myself am convinced that Mr. Zemansky, who is now on the stand, either for personal reasons of his own, is reluctant to give us the entire picture, or because of the many things which have happened in his business and perhaps to himself personally since this thing occurred, that he does not just remember as thoroughly as otherwise he might. I think we should permit Mr. Chotiner with reasonable care at least to ask leading questions here. After all is said and done, the Court is not going to decide this case simply and solely on the testimony of Mr. Zemansky. I am going to hear all the witnesses and all of the testimony and take into consideration that perhaps Mr. Zemansky gave some of his evidence after leading questions were asked. After I get the whole picture of the entire thing, then I will come to a conclusion. Let us proceed. * * * *

Q. By Mr. Chotiner: Now, Mr. Zemansky, so I won't have to ask any leading questions of you, have you given us all [154] of the conversation that you can now remember that took place between you and Mr. Kleinman regarding the subject matter of his taking a cut in salary?

(Testimony of Sol Zemansky.)

Mr. Wolver: I don't believe there was any testimony about his taking a cut in salary in this proceeding.

Q. By Mr. Chotiner: Did you have a conversation with Mr. Kleinman regarding a reduction of his salary?

A. If I recall it, I think he volunteered to cut his salary.

Q. What was he receiving at the time?

A. \$75 a week.

Q. To what was it cut?

A. To \$50, I believe.

Q. What did Mr. Kleinman tell you when he volunteered to take a cut in salary, if anything?

A. Well, he said that business was quiet and he figured everybody should work to reduce the expense.

Q. Did he say anything else regarding that subject matter?

A. I don't recall anything else.

Q. For the purpose of refreshing your memory, did he tell you that he was of the opinion that conditions, as they then existed in the business, could not last, in substance or effect?

Mr. Wolver: Objected to as leading and suggestive.

The Referee: Overruled. [155]

A. I don't recall that.

Q. By Mr. Chotiner: Did Mr. Kleinman say anything to you at that time regarding the subject

(Testimony of Sol Zemansky.)

of whether or not the business could pay him \$75 per week? A. I don't recall that.

Q. For the purpose of refreshing your memory, isn't it true that Mr. Kleinman told you that the business did not justify paying him \$75 per week?

A. I don't recall that. [156]

Q. By Mr. Chotiner: For the purpose of refreshing your memory, isn't it true that Mr. Kleinman told you, "How do you expect us to make loans when there is no money in the cash drawer?"

A. There was a conversation in reference to that, but I don't recall how it came about.

Q. Did your conversation take place before or after the security was first given to Mr. Kleinman?

A. I believe it was before and after, both.

Q. Have you given us all the conversation that you had with Mr. Kleinman regarding the subject matter of your devoting your full time to the pawnbroker business?

Mr. Wolver: That is objected to as assuming facts not in evidence. There was no such conversation that I recall, here.

The Referee: I don't think we have had any evidence on that.

Q. By Mr. Chotiner: Did you have a conversation with Mr. Kleinman regarding the subject matter of your engaging in business other than the pawnbroker business? A. I don't recall any.

Q. For the purpose of refreshing your memory, isn't [157] it true that Mr. Kleinman told you that

(Testimony of Sol Zemansky.)

if you received a break in the Tango business, you would be able to continue in the pawnbroking business?

Mr. Wolver: May I have that question?

(Question read.)

A. I don't recall.

Q. By Mr. Chotiner: For the purpose of refreshing your memory, isn't it true that Mr. Kleinman told you that if you were able to operate the Tango games, you could work things out, otherwise you could not?

A. I don't recall any such conversation.

Q. Did you ever have a conversation with me after your petition was filed in Chapter 11, in which I asked you for a statement of the events and facts concerning the Kleinman transaction?

Mr. Wolver: That is objected to as being incompetent, irrelevant, and immaterial, not proper direct examination, attempting to impeach the questioner's own witness.

Mr. Laugharn: If the Court please, on that particular question——

The Referee: I don't think this question will do any harm. It merely is, did you have a conversation with Mr. Chotiner after the Chapter 11 proceedings had started, in which he asked you for a statement on the Kleinman matter. A. I did.

Mr. Laugharn: On that point, if the Court would clear [158] us up on one matter, we could probably proceed more rapidly, and that is whether or not the

(Testimony of Sol Zemansky.)

Court is considering that this witness is our witness to the point of binding the Trustee. Now, as an elementary point, we think we can argue that he is not under the case of—what was that case?

Mr. Weller: The Anches, as I recall; that is my recollection.

Mr. Laugharn: Now if he is our witness and if this man is giving us a statement entirely different, entirely elaborated on those points and then takes the stand and does not follow that statement in any of these major particulars, then we are presumed to be somewhat surprised and can take another course of action in connection with it.

The Referee: What do you think the law is?

Mr. Laugharn: We think we are not bound by this witness. We think we should have the latitude that apparently the Court is now giving us in trying to bring out these matters, because we will bring them out in the general matter of impeachment anyway; I mean, as to having made this statement. We are going to ask Mr. Dienstag to testify, especially about these conversations. Here is a matter that changed the entire course of business of this bankrupt; it took weeks to consummate, a trip to Los Angeles and a trip to San Francisco, and yet this witness [159] dismisses it just with one sentence. That was all discussed at the time when he was insolvent and we have already perfected the record as to his financial condition at that time.

(Testimony of Sol Zemansky.)

The Referee: Let me ask you a question, for what purpose is this evidence being introduced; what issue does it affect?

Mr. Laugharn: We want to show first the position of Kleinman in this business, his closeness to it.

The Referee: Yes, I know, but what does it bring us to; does it bring us to the question of preference or what?

Mr. Laugharn: It goes to the question of the knowledge of insolvency and the demand for the security.

The Referee: Then it leads to your objection on the ground of preference, is that right?

Mr. Laugharn: It goes to that point.

(Discussion between Court and counsel.)

The Referee: Let us get down to the question Mr. Laugharn asks. I am satisfied, gentlemen, that the modern decisions are to the effect that it is the duty of the Court to legitimately bring out all the facts.

Mr. Wolver: That is right.

The Referee: And it is not a question of who is going to be bound by any particular evidence that is brought out, but I think that both sides should have the opportunity, [160] within reasonable limits, of asking such questions of witnesses who are brought on the stand, whether the side that asks the questions brought that witness or not, as will bring out all the legitimate facts of the case. Now, these bankruptcy cases are a bit difficult and they are a

(Testimony of Sol Zemansky.)

bit different from State Court cases. Mr. Zemansky here has no personal interest in the outcome of this matter at all, I mean, insofar as dollars and cents is concerned.

* * * *

Q. By Mr. Chotiner: Approximately how many conversations did you have with Mr. Kleinman regarding the subject matter of giving him security before you consented to it?

A. There might have been several.

Q. Did any of those conversations take place in the presence of Mr. Dienstag before you consented to give the security?

A. I think Mr. Dienstag may have been present one day or two; I don't recall.

Q. At the time when Mr. Dienstag was present at a conversation, will you tell us what the conversation was, if there was any, regarding the subject matter of giving security to Mr. Kleinman?

A. Well, Mr. Dienstag merely explained the situation as to how to handle it from a strictly legal point.

Q. What did he say?

A. About giving Mr. Kleinman the security and working [161] out these contracts and replacing the collateral with other collateral, after the collateral that was up had been redeemed.

Q. That took place before you consented to give the security, is that correct?

A. I believe so.

(Testimony of Sol Zemansky.)

Q. Now, was there anything said by any of the parties to the conversation at which Mr. Dienstag was present, as to what Mr. Kleinman's course of conduct would be if you did not give the security?

A. There was never anything mentioned.

Q. Was that subject ever discussed at any time?

A. No.

Q. By Mr. Chotiner: Now, directing your attention to the occasion when Mr. Dienstag was in Los Angeles a few days prior to your signing the contract of February 24, [162] 1939, have you given us the entire conversation as you now recall it, that took place on each occasion when Mr. Dienstag was present regarding the subject matter of giving security to Mr. Kleinman?

A. So far as I recall.

Q. Was anything said by Mr. Dienstag or anyone else in that conversation regarding your being available to sign a contract?

A. Yes, I believe the papers were to be signed on a certain afternoon or in the evening, and I had to leave for San Francisco. I got an unexpected call.

Q. Did you impart that information to Mr. Dienstag?

A. No.

Q. Did you tell anyone that you were going to San Francisco?

A. My brothers knew it.

Q. Did you tell Mr. Kleinman?

A. I don't recall whether I did or not.

Q. When you were in San Francisco, did you receive a telephone call from Los Angeles regarding this subject matter?

(Testimony of Sol Zemansky.)

Mr. Wolver: That is objected to as assuming facts not in evidence.

The Referee: Overruled.

A. I don't recall.

Mr. Dienstag: Pardon me. Was that question directed [163] to the period after Mr. Sol Zemansky reached San Francisco and before he signed the contract?

Mr. Chotiner: Yes, with regard to which he testified he did get a call. He has testified that he received one at the St. Francis Hotel from you notifying him that you were in town.

Mr. Dienstag: Is that what you are speaking of?

Mr. Chotiner: No, I am trying to find out whether he got a call from Los Angeles.

Mr. Dienstag: I am sorry.

Q. By Mr. Chotiner: Let's get at this question. At the time you were in San Francisco, around February 24th, you would know what occasion we are talking about now? A. Yes.

Q. Did you receive any telephone call from Los Angeles from anyone, in which the subject was discussed pertaining to the giving of security to Mr. Kleinman?

Mr. Wolver: That is objected to, your Honor, as being incompetent, irrelevant, and immaterial. If it is limited to Mr. Dienstag or Mr. Kleinman, we would have no objection, otherwise clearly the question is necessarily hearsay.

The Referee: Overruled.

(Testimony of Sol Zemansky.)

A. I don't recall any conversation.

Q. By Mr. Chotiner: Then, the only telephone call you received regarding this subject matter when you were in San Francisco was one from Mr. Dienstag to the effect [164] that Mr. Dienstag was in town and wanted you to come down to the office; is that right?

A. That is the way I recall it.

Q. When you went down to Mr. Dienstag's office, was any conversation held prior to your signing the contract?

A. Not that I recall. I believe he handed me the contract and I read it through and signed it. That was about all that took place there.

Q. Did you ever tell Mr. Dienstag prior to the signing of the February 24th contract, that you would be unable to give Mr. Kleinman any security?

A. I don't recall that.

Q. Well, did you consent to give security to Mr. Kleinman during the first conversation that you had with Mr. Dienstag in Los Angeles regarding that subject matter?

A. In other words, my first conversations, I believe, were with Mr. Kleinman, not Kleinman and Dienstag.

Q. I know that, but I mean your first conversation with Mr. Dienstag, did you consent during that conversation to give security to Mr. Kleinman?

A. I had already told Mr. Kleinman it would be all right. [165]

(Testimony of Sol Zemansky.)

Q. During the time you were holding these conversations with Mr. Kleinman, were you putting him off in any way?

Mr. Wolver: That is objected to, your Honor; in the first place, it is unintelligible, and in the second place it is incompetent, irrelevant, and immaterial, and calls for the conclusion of the witness.

The Referee: Overruled. Answer the question.

A. I will have to answer that, your Honor, with a little explanation.

The Referee: All right.

A. Naturally, I was only one of three partners in the business and I would have to take it up with my partners before I could say yes or no.

Q. Your two brothers, Abe and Dave Zemansky, were in Los Angeles from the end of 1938 to February 24, 1939, weren't they?

A. Yes, I believe they were.

Q. You saw your brothers practically every day during that period of time, isn't that true?

A. Yes.

Q. You lived in the same house with your brother Dave [166] Zemansky, isn't that true?

A. Yes.

Q. Did you take that subject matter up with your two brothers the first time when Mr. Kleinman first suggested it to you?

A. I couldn't say. I did take it up with them.

(Testimony of Sol Zemansky.)

Q. At any rate, it was talked over either the end of 1938 or the first part of 1939, before February 24th, 1939, before the contract was executed, is that right? A. That is correct.

Q. Now, for the purpose of refreshing your memory, isn't it true, Mr. Zemansky, that for a period of two weeks you kept putting off Mr. Kleinman so far as giving him security was concerned?

Mr. Wolver: That is objected to as calling for the conclusion of the witness, assuming facts not in evidence.

Mr. Dienstag: And immaterial. It is also immaterial.

The Referee: Overruled. Answer the question, please.

The Witness: May I have the question?

(Question read.)

A. It may have been that period. I talked to him, but I wouldn't say I was putting him off.

Q. By Mr. Chotiner: Then I will ask you if, on or about August 7, 1939, you had a conversation with me at my office, located at 508 James Oviatt Building, 617 South Olive Street, in which you told me that for a period of two [167] weeks you kept putting off Mr. Kleinman.

Mr. Wolver: That is objected to as incompetent, irrelevant, and immaterial, not proper impeachment, and hearsay. I might invite the Court's attention to the fact that we have evidence here of Mr. Kleinman leaving their employ because of going on

(Testimony of Sol Zemansky.)

a vacation. By his question, Mr. Chotiner assumes that Mr. Kleinman was always in town and available during this whole period.

The Referee: I know, but the question is simply, did you or did you not make such statements to Mr. Chotiner. That brings us squarely up to the point whether counsel for the Trustee should be permitted, in the light of the present state of the record, to impeach this witness.

(Discussion between Court and counsel.)

The Referee: The objection is overruled. Read the question.

(Question read.)

A. That is a question that can't be answered yes or no. I had many conversations with Mr. Chotiner, but I don't recall what they all were.

Q. By Mr. Chotiner: Then, I assume at this time you don't recall whether you ever told me that, is that it?

A. I don't recall those specific ones, no.

Q. In substance or effect, did you tell me that statement?

A. I don't recall anything like that. [168]

Q. Now, directing your attention to February 24, 1939, when the contract, Trustee's Exhibit No. 4, was executed, you have that occasion in mind, have you not?

A. Yes.

Q. Subsequent to February 24, 1939, other contracts were executed, is that correct, with Mr. Kleinman?

A. That is correct.

(Testimony of Sol Zemansky.)

Q. Now, do you recall at this time the circumstances under which the contract dated March 2, 1939, for \$25,920.50, which is Trustee's Exhibit No. 5 by reference, was executed?

A. I don't recall.

Q. Well, do you recall, after executing the February 24, 1939, contract, that there was another contract executed on March 2nd for approximately \$25,000?

A. There was a second contract, but I don't recall the amount.

Q. I will now show you Trustee's Exhibit No. 5 by reference, being the agreement dated March 2, 1939, amount, \$25,920.50, I will ask you to look at that contract, and after you have done so tell me whether you recall the circumstances under which that contract was executed?

A. I don't recall it, sir.

Q. You signed that contract, didn't you, that copy?

A. I assume I must have signed it.

Q. For the purpose of refreshing your memory—withdraw that. Can you tell us why that contract was executed? [169]

Mr. Miller: Objected to.

The Referee: Overruled.

A. I assume we must have owed Kleinman that amount of money.

Q. By Mr. Chotiner: Did that contract represent an equal amount of pledges that had been with-

(Testimony of Sol Zemansky.)

drawn from the pledges that had been given to Mr. Kleinman as security other than the February 24th contract?

A. I am not familiar with those contracts but it may have had something to do with the Simons situation.

Q. Between February 24, 1939, and March 2, 1939, did Mr. Kleinman advance you new cash in the sum of approximately \$25,000?

A. I don't believe so.

Q. As a matter of fact, you know that he did not, isn't that true?

Mr. Wolver: That is objected to as argumentative.

The Referee: Anyway, it is overruled.

Mr. Chotiner: May we have an answer to the question?

The Witness: What was the question?

Q. By Mr. Chotiner: May we have an answer to the question?

A. He didn't advance any money at that time.

Q. Now, it was between February 24, 1939, and March 2, 1939, that security was given to the Simons Lunch Room and the Gans creditors, isn't that true? [170]

Mr. Dienstag: What were those dates?

Mr. Chotiner: Between the date of February 24th and March 2, 1939.

A. To Simons, but not to Gans.

(Testimony of Sol Zemansky.)

Q. By Mr. Chotiner: Does that refresh your memory as to the circumstances under which the March 2, 1939, contract was executed?

A. I am not certain. I think some loans were taken from Mr. Kleinman's box and put in the Simons deal.

Q. And that was done with Mr. Kleinman's consent, isn't that true? A. Yes.

Q. As a matter of fact, Mr. Kleinman offered to do so, isn't that true? A. Yes. [171]

Q. By Mr. Chotiner: Now, on March 22, 1939, a contract was executed in the sum of \$2,510, which is Trustee's Exhibit No. 6. I will ask you to look at that exhibit, and after looking at it tell me if you recall the circumstances under which that contract was executed.

A. Those things, after they were replaced, were always handled by my brother and I merely signed the papers.

Q. Which brother handled it?

A. Abe, generally.

Q. Did Dave Zemansky ever handle any of them? A. I don't think so. [172]

Q. What were the circumstances, if you know them or can recall them, under which these contracts were executed so far as the setting aside of security for Mr. Klienman was concerned?

A. Well, I believe the mechanics of it was he was given new loans and a new deal was made, a new note executed for that amount of money.

(Testimony of Sol Zemansky.)

Q. When this new note was executed, did Mr. Kleinman give you the amount of money represented by that new note?

A. I never handled the transaction, but my brother handled it.

Q. Which brother handled it? A. Abe.

Q. When the new notes were executed, new loans were set aside as security for Mr. Kleinman, is that correct?

A. I understand that was the way it was always done.

Q. Were those new loans set aside for Mr. Kleinman at the time when the old loan was withdrawn by virtue of redemption by customers?

A. I believe so.

Q. At the same time?

A. Yes sir; will you ask that question again?

Mr. Chotiner: Read the question.

(Question read.)

Q. By Mr. Chotiner: Do you understand the question?

A. Yes, but the answer to it would be no. They were [173] not set aside at the same time, because those were the accumulation.

Q. In other words, whenever these new contracts were executed, they were the result of an accumulation of loans that had been withdrawn from the Kleinman security on account of redemption?

A. That is correct.

(Testimony of Sol Zemansky.)

Q. How would you arrive at what periods you would execute these new contracts?

A. I don't believe there was an definite period ever worked out.

Q. Who broached the subject whenever these contracts would be executed?

A. Mr. Kleinman. [174]

Q. Mr. Zemansky, directing your attention now to the time when you had a conversation with Mr. Kleinman, at which Mr. Dienstag was present, was there any conversation regarding the subject matter of how the new contracts were to be handled?

A. As I recall, Mr. Dienstag, I believe, said at that time that as new contracts were to be made, it would sort of work out on a revolving theory; in other words, new loans followed old loans, making a new contract each time it built up. That was about the substance of it.

Q. Do you recall any further conversation with Mr. Dienstag at which that subject matter was discussed?

A. No, I don't recall anything else.

Q. Was anything said regarding the subject matter of the execution of new notes?

A. Yes, they asked to have new ones.

Q. Who said that?

A. I believe Mr. Dienstag, in explaining the mechanics [175] of the thing how it should be worked out.

Q. Tell the Court as best you can recall at this time, recognizing that you cannot be expected to

(Testimony of Sol Zemansky.)

remember each word that each person said, but tell us as you can best recall it, what Mr. Dienstag said as to how the mechanics of having these new notes would be handled.

A. Well, as loans were redeemed, the ones Mr. Kleinman was holding would be totaled up and a sum equivalent to that would be replaced and a new note given.

Q. Was anything said about any checks being given in connection with these new notes?

A. Yes, I believe he said if we paid for the old loans, that were redeemed, new money would be given in lieu of the new transaction.

Q. Did you receive new money in the same amount as the new contracts from Mr. Kleinman?

A. The amount varied, I believe.

Q. Well, directing your attention to Trustee's Exhibit No. 5, being the contract of March 2, 1939, in the sum of \$25,920, at the time that contract was executed, did you receive from Mr. Kleinman the sum of appriximately \$25,000 in cash?

A. No, I don't believe so.

Q. At the time the contract of March 22, 1939, in the sum of \$2,510 was executed, did you receive that sum of money from Mr. Kleinman? [176]

A. Those were the contracts I am not thoroughly familiar with. They were handled by my brother Abe.

Q. Now, directing your attention to the time when the security was given to the Simons people,

(Testimony of Sol Zemansky.)

I believe you testified that Mr. Kleinman volunteered to let you use some of the pledges that had been given to him for security, is that correct?

A. Yes, that is correct.

Q. Now, when Mr. Kleinman volunteered to do that, what did he say to you?

A. Well, we were trying to get the pledges together for Simons and he said he would do this and replace them with others.

Q. Did he tell you why he would let you use them?

A. No, there wasn't any particular reason why.

Q. Was that subject discussed in any manner at all as to why you could use some of his pledges, which had been given to him a few days prior to that time?

A. No, there was no discussion of it.

Q. During the time you were consummating the giving of security to Simons that night at the Provident Loan Association, did you leave the room at any time and go out and talk to Mr. Kleinman regarding that subject?

A. Yes, I believe I did.

Q. What did you say to Mr. Kleinman on this occasion?

A. Well, when I explained to him that we wanted to get [177] this loan matter settled, he said that would be all right.

Q. Was anything else said?

A. I don't recall anything else.

(Testimony of Sol Zemansky.)

Q. Was the Sheriff in the Provident Loan office during the time you were consummating this transaction with the Simons people? A. Yes.

Q. And was Mr. Kleinman there at the same time? A. Yes.

Q. Do you know whether Mr. Kleinman saw the Sheriff there that night?

Mr. Wolver: That is objected to.

The Referee: Overruled.

Q. By Mr. Chotiner: How close were they?

The Referee: If you know.

A. I believe the Sheriff was out in the hallway and as Mr. Kleinman came in the premises, he would probably have to see him.

Q. I will now show you Trustee's Exhibit A for Identification, consisting of three white slips of paper, and ask you what they represent.

A. There is one here for \$200, which has on it "558." I don't know whether Mr. Kleinman drew the \$200 at the Main Street store or at the Provident. [178]

Q. Are you familiar with the signature of Sam Kleinman?

A. I don't believe that is his signature. It looks like my brother Dave's.

Q. Directing your attention to the second slip there for \$50, with the name "S. Kleinman" on there, dated July 5, 1939.

A. That is Mr. Kleinman's signature.

(Testimony of Sol Zemansky.)

Q. What does that represent, that piece of paper?

A. That \$50 was drawn at the Provident by Mr. Kleinman.

Q. Directing your attention to the third slip, dated July 6, 1939, \$50, with the name "S. Kleinman," what does that represent?

A. \$50 drawn by him at the Provident.

Q. Is that the signature of S. Kleinman?

A. Yes.

Q. Are you familiar with the signature of S. Kleinman? A. Yes.

Q. Have you seen it on numerous occasions?

A. Yes.

Q. Have you ever seen him write his name?

A. That is his signature.

Q. Can you tell me whether or not—by the way, what do you call these slips of paper in the operation of your business? A. Oh, tabs.

Q. Is that what they were known as by Mr. Kleinman? [179] A. Yes.

Q. By Mr. Wolver: That is objected to as calling for the conclusion of the witness.

The Referee: It may go out.

Q. By Mr. Chotiner: Do you know what Mr. Kleinman called the slips of paper?

Mr. Wolver: The same objection.

Mr. Chotiner: I asked him if he knows.

The Referee: Overruled.

A. I suppose he called them tabs also.

(Testimony of Sol Zemansky.)

Q. By Mr. Chotiner: Now, can you tell us whether or not the sums of money represented by these tabs, or the second and third tab, were ever repaid to the Provident Loan Association?

Mr. Wolver: That is objected to as assuming facts not in evidence, that there was any obligation.

The Referee: I don't understand you.

Mr. Wolver: That assumes they represented an obligation.

The Referee: What else would they represent? The witness has testified that those instruments represent a withdrawal by Mr. Kleinman.

Mr. Wolver: I will withdraw my objection.

The Referee: The question is were these two loans, not the first one, ever repaid?

A. I don't know. [180]

Q. By Mr. Chotiner: Well, did Mr. Kleinman ever draw money from the Provident Loan Association other than those two occasions there just identified by you, and give tabs as evidence of it, on other occasions?

Mr. Wolver: That is objected to.

The Referee: Overruled.

A. I believe he had drawn money at other times.

Q. By Mr. Chotiner: When he would draw money on other occasions, would he sign one of these tabs? A. Yes.

Q. When the money was repaid, what would be done with the tab?

(Testimony of Sol Zemansky.)

Q. What does that represent, that piece of paper?

A. That \$50 was drawn at the Provident by Mr. Kleinman.

Q. Directing your attention to the third slip, dated July 6, 1939, \$50, with the name "S. Kleinman," what does that represent?

A. \$50 drawn by him at the Provident.

Q. Is that the signature of S. Kleinman?

A. Yes.

Q. Are you familiar with the signature of S. Kleinman? A. Yes.

Q. Have you seen it on numerous occasions?

A. Yes.

Q. Have you ever seen him write his name?

A. That is his signature.

Q. Can you tell me whether or not—by the way, what do you call these slips of paper in the operation of your business? A. Oh, tabs.

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The Referee: Overruled.

A. I believe he had drawn money at other times.

Q. By Mr. Chotiner: When he would draw money on other occasions, would he sign one of these tabs? A. Yes.

Q. When the money was repaid, what would be done with the tab?

(Testimony of Sol Zemansky.)

A. Given to him or destroyed by ourselves.

Q. I will now show you a photograph and ask you what that picture represents?

A. That is the front vault door of the Provident.

Q. And is that the vault that was used by the Provident Loan Association during the time of your transactions with Mr. Kleinman?

A. Yes. [181]

Q. And who had the combination to the safe?

A. Mr. Kravitz had the combination.

Q. And all three Zemansky Brothers?

A. All three Zemansky Brothers.

Q. Did Mr. Kleinman have the combination?

A. I don't think he had the combination of the vault.

Q. Now, directing your attention to Exhibit 10-B, being [183] a picture of the vault with the door open, after the combination was used did the vault door open?

A. Then the vault door would open.

Q. Then what would be necessary to get inside the vault after the door was open?

A. You would first have to open this gate again.

Q. The gate on the right-hand side?

A. Yes. Then this one operated with a key.

Q. Which one are you referring to?

A. That is what we called the day gate, the technical term day gate, of the vault, and that operated with a key.

(Testimony of Sol Zemansky.)

Q. Who had access to that key?

A. All the loan clerks.

Q. And all of the Zemansky Brothers?

A. That is right.

Q. Did Mr. Kleinman have access to that key also? A. Yes.

Q. When that key would open the door, then the person would be right inside of the vault? Is that correct? A. That is right.

Q. Now, directing your attention to Trustee's Exhibit 10-C, you said that represents the interior of the vault. Will you explain to the Court what the little rectangular squares represent in that picture?

A. They were cardboard, on which we used to number the pledges the way they ran. [184]

Q. Inside of these boxes were what?

A. The loan pledges.

Q. When you use the term "loan," that is synonymous with pledges of the customers?

A. That is correct; pledges and loans are the same.

Q. When the pledges were set aside as security for Mr. Kleinman, were the boxes marked in any manner?

A. I believe there was a "K" in front of the boxes on the cardboard.

Q. Then I take it you would have one complete drawer of pledges that would be used for the Kleinman security; did you change the position of that box?

A. Well, the boxes increased as we went along;

(Testimony of Sol Zemansky.)

in other words, we merely started with one box and there was an increase of two or three.

Q. Let us assume that one of the boxes was the first box in the second row, that had been set aside for Mr. Kleinman as security; was the position of that box changed in any way?

A. I don't know, Mr. Chotiner.

Q. I will now show you an enlarged photograph and ask you what that represents.

A. That is a section of the interior of the vault.

Q. And it shows the drawers where the pledges were kept, is that right? A. Yes. [185]

Q. And that is in the same condition as they were during the time of each transaction with Mr. Kleinman? A. Yes.

Mr. Chotiner: We ask that this be marked as Trustee's Exhibit No. 10-D in evidence.

The Referee: Received as Trustee's Exhibit 10-D.

Q. At the time the security was given——

Mr. Dienstag: Just a moment, please, Mr. Chotiner; may I see that exhibit if you are through with it?

Q. By Mr. Chotiner: At the time the security was first given to Mr. Kleinman, were the boxes which contained these pledges marked at that time with any insignia? A. I don't know.

Q. Do you know of your own knowledge whether they were marked at any time after that?

A. The Kleinman pledges, I believe, always had a "K" on them.

(Testimony of Sol Zemansky.)

Q. Do you know when that "K" was put on there in relation to the time they were set aside for Mr. Kleinman?

A. I think at the time we set them aside.

Q. Were you present on any of those occasions?

A. No, that transaction was handled by Mr. Kravitz.

Q. At the time when security would be given to Mr. Kleinman, were the pledges transferred from one box to another box?

A. Yes. [186]

Q. What would be done with the box from which the pledges had been transferred?

A. The other loans would remain in that box.

Mr. Chotiner: You may cross-examine.

Cross-Examination

By Mr. Wolver:

Q. Mr. Zemansky, I believe you told us you knew Mr. Kleinman for a great number of years?

A. About 25 years or more.

Q. Prior to 1933, did you have any monetary transactions with Mr. Kleinman by way of loans or otherwise?

A. Yes.

Q. Do you recall approximately when you had your first transaction with him?

A. I think it was sometime in 1926 or 1927, '26 or '27.

Q. Do you recall about how much money was involved during that year?

A. I never knew the amount until Mr. Chotiner mentioned it the other day at the examination.

(Testimony of Sol Zemansky.)

Q. Does that refresh your memory?

A. Yes.

Q. How much was it? A. \$30,000.

Q. Was that repaid to Mr. Kleinman?

A. It was repaid, yes. [187]

Q. The following year did you have any monetary transactions with Mr. Kleinman?

A. You mean after 1926 or 1927. He was paid back around '29 or '30; then I don't think we had any more transactions with him until 1933.

Q. Would it be fair to say, Mr. Zemansky, that between 1927 and 1929 you had considerable monetary transactions with Mr. Kleinman, all of which were repaid to him prior to 1929?

A. Yes.

Q. Then in 1933 you had another monetary transaction with Mr. Kleinman? A. Yes.

Q. And you had several monetary transactions until 1935, is that correct?

A. That is correct.

Q. Do you know whether or not Mr. Kleinman was in business during 1933?

A. I am not certain as to that.

Q. However, in 1935 Mr. Kleinman entered your employ? A. Yes.

Q. Now, at the time he entered your employ, you had considerable merchandise, consisting of unredeemed pledges, on hand? A. Yes.

Q. And you had a conversation with him, is it not true, [188] Mr. Zemansky, prior to that time, in which you asked him to come in and assist

(Testimony of Sol Zemansky.)

you in disposing of this unredeemed merchandise or part of it? A. Yes.

Q. And primarily, the reason that he entered your employ at that time was to dispose of your merchandise?

A. That was the primary reason.

Q. At that time you knew Mr. Kleinman was well known in the precious gem industry in this community? A. Yes.

Q. You knew at that time that he had a great number of contacts with jobbers and wholesalers?

A. Yes.

Q. Was that not the reason that actuated you in employing Mr. Kleinman?

A. That, plus the fact that I have a lot of respect for his ability as a diamond expert.

Q. You also knew he was a very fine gem expert? A. Yes.

Q. Now, when he entered your employ, do you remember approximately the date?

A. I don't.

Q. Would it be fair to say it was in the latter part of 1935?

A. I wouldn't want to fix the date, but the record will show from his first check, his first salary check. [189]

Q. Is it not a fact that it was approximately the time when you opened up the new Provident?

A. I believe it was right around that time.

Q. Now, when he first entered your employ, you gave him merchandise to sell? A. Yes.

(Testimony of Sol Zemansky.)

Q. Do you recall the amount of the merchandise—I don't mean in value, but in the number of articles? A. No, I don't.

Q. Was it a considerable number?

A. A very large amount, and in dollars and cents also.

Q. And he sold that for you? A. Yes.

Q. And that took up practically all of his time for the first, for the earlier period of time he was with you? A. Yes.

Q. Do you recall about how long it was that practically all of his time was taken up with this type of work?

A. I couldn't fix the period.

Q. During that time you found out that Mr. Kleinman was very expert in his appraisals of precious stones and gems?

A. I had a lot of confidence in his ability.

Q. Do you recall approximately how much he sold for you shortly after he came to work for you, in money?

A. I don't know, but the record will show from the [190] first percentage that he received. It was one per cent of the total. That will tell you the total amount that he sold.

Q. That was a considerable amount?

A. That was a considerable amount.

Q. Do you recall if it approximated or exceeded a million dollars?

A. I should judge it was less than that.

(Testimony of Sol Zemansky.)

Q. Would it be fair to say that it was in the neighborhood of a million dollars?

A. No, I don't think it was a million dollars.

Q. Was it seven hundred thousand?

A. It probably was in that neighborhood.

Q. You don't recall the exact figure?

A. The figure can be obtained correctly.

Q. At this time, you don't recall exactly?

A. No, I don't recall.

Q. During any of that period, Mr. Zemansky, you were not giving to Mr. Kleinman as much merchandise to sell as you formerly had?

A. That is correct.

Q. You provided him with a separate office?

A. Yes.

Q. And throughout the transactions he has maintained that office in your premises?

A. Yes. [191]

Q. Where was that office situated?

A. That was in the northeast corner of the room.

Q. Did he have a desk in that office?

A. Yes.

Q. And that desk contained his personal property and no other person went there?

A. I believe it was his personal property.

Q. You never went to his desk?

A. No, I never opened his desk.

Q. And no other person did in your presence?

A. Not that I know of.

Q. Do you know if it was locked from day to day?

A. Yes, he had it locked. [192]

(Testimony of Sol Zemansky.)

* * * *

Q. Wasn't that also true of Mr. Kleinman, when they got real busy he would step behind there and give them help?

A. Well, in the latter part of his time there, he spent a considerable time in the loan department, but at the inception, when he went to work for us, he spent very little time.

Q. When you say "latter part," Mr. Zemansky, approximately what period do you refer to?

A. Oh, I was referring to the last six or seven months prior to July of 1939.

Q. At that time were you giving him very much merchandise to sell?

A. Not very much.

Q. He didn't stop by the loan department when he had merchandise to sell?

A. When he had merchandise to sell, he devoted most of his time to the merchandise.

Q. Now, when merchandise was given to him to sell, it was necessary for him to assort and appraise the merchandise? A. Yes.

Q. And he did that? [193] A. Yes.

Q. Then it was necessary for him to contact other merchants? A. That is right.

Q. State, if you know, whether or not he ever went into or obtained other parts of your merchandise to find a desired stone for purchasers?

A. That isn't quite clear to me.

Q. Did he ever go into any merchandise that was not given to him, did he ever examine that

(Testimony of Sol Zemansky.)

to see if he could find therein a stone for some purchaser, who wanted a particular type of a stone? A. Yes, sometimes.

Q. And that took some of his time?

A. Yes.

Q. All of those things you have told us took a considerable part of his time?

A. Considerably.

Q. Now, Mr. Zemansky, did you ever see the loan clerks consult Mr. Kleinman relative to the appraising of stones?

A. Yes, many times.

Q. That was generally, Mr. Zemansky, when a loan clerk was in doubt as to the value of a stone in proportion to the amount of loan which a customer desired? A. That is right. [194]

Q. Now, Mr. Zemansky, after Mr. Kleinman had been working for some little time, do you recall whether there [195] was any change in the condition of his health?

A. Yes, he was having some trouble with his leg and I think with his breathing, his lungs.

Q. His health was failing?

A. He didn't look any too healthy.

Q. And do you recall that sometime in May, 1938, he told you that he desired a vacation or he wanted to be relieved of part of his duties?

A. Yes.

Q. He told you he didn't desire to come into the place of business quite as early as he formerly had? A. That is right.

(Testimony of Sol Zemansky.)

Q. At that time didn't he state that the amount of sales or the amount of merchandise that had been given to him to sell had so diminished it didn't require quite as much of his time?

A. That is right.

Q. And he said that he desired that his salary be reduced from \$75 to \$50, and that he would not come down as early as he had or devote quite as much time?

Mr. Laugharn: I object to that compound question.

The Referee: Simplify it, please.

Q. By Mr. Wolver: He said that at that time he desired his salary to be reduced from \$75 to \$50? A. Yes. [196]

Q. He did leave your employ at the end of 1938?

A. No, I don't think so. I think he was there in 1939. [197]

Q. By Mr. Wolver: Do you recall that Mr. Kleinman did leave at any time?

A. No, unless he left town for a short period, but I believe he was still in our employ up to the July situation. [198]

Q. Do you recall about a week after you gave Mr. Dienstag the pledge ticket, having another conversation with Mr. Dienstag?

A. I don't recall.

Q. Do you recall Mr. Dienstag having a draft of a proposed contract with him? [200]

(Testimony of Sol Zemansky.)

A. I recall him having a draft but I don't know whether that was the original time that he presented me with the draft or whether there was another meeting.

Q. You don't recall if it was at the conversation at which time you gave him the pledge, or another time? A. No, I don't recall.

Q. But you do recall him having the draft?

A. I recall giving him the ticket and I recall him having either the draft or the original contract, one or the other.

Q. Do you recall discussing the terms of this contract with him?

A. No, I believe it was explained to me at the time I talked to him with Mr. Kleinman, Mr. Dienstag and myself.

Q. Do you recall if a conversation and discussion was had concerning all of the obligations between Kleinman and Zemansky Brothers?

A. Yes.

Q. Do you recall at that time a discussion had concerning a note signed by yourself and Max Golob? A. Yes sir.

Q. Didn't Mr. Dienstag at that time say that he wanted this contract that he was going to draw to include all the transactions between the parties?

A. That is correct.

Q. Do you recall for what purpose you gave Mr. Dienstag [201] the specimen of the pledge ticket?

A. I believe he wanted to base his contract on that ticket.

(Testimony of Sol Zemansky.)

Q. There was a provision on the back of the ticket of the law?

A. Several provisions that he wanted to see.

Q. At this conversation we were discussing, Mr. Zemansky, you discussed with Mr. Dienstag the origin of all the obligations? A. Yes.

Q. A considerable time was used in that discussion in explaining the origin of all the obligations?

A. I don't know how much time. Mr. Dienstag knew the obligations and I knew them and Mr. Kleinman had the notes.

Q. Those were evidenced and viewed at that time? A. Yes, that is correct.

Q. Do you recall any other part of that conversation? A. No.

Q. Do you recall whether or not Mr. Dienstag said he would put his contract into finished form?

A. Yes.

Q. Did Mr. Dienstag say he would cause the contract to be put in finished form? A. Yes.

Q. At that time, do you recall requesting Mr. Kravitz and Mr. Sego to start the selection of pledges? [202]

A. I think it was Mr. Kravitz.

Q. Do you recall doing that on that occasion?

A. That was after Mr. Dienstag said he would draw the contract.

Q. After he said he would bring it in finished form, that same meeting you had Mr. Kravitz start the segregation of the pledges?

(Testimony of Sol Zemansky.)

A. That is right.

Q. Do you recall about how long that was prior to the time that the contract was signed?

A. I don't know the period.

Q. Shortly after that, Mr. Zemansky, you left for San Francisco? A. Yes.

Q. Did you have any conversation with Mr. Dienstag or Mr. Kleinman prior to your leaving?

A. I believe they were to bring the contract either that night or the following day, and then I had to go to San Francisco on a hurry up trip, and I stayed at the St. Francis Hotel, and the following morning there was a call from Mr. Dienstag.

Q. And pursuant to that call you went to the office of Mr. Dienstag?

A. He asked me to come down to his office. I went down and signed the contract at his office.

Q. At the same time you also signed the notes? [203] A. Yes.

Q. At that time the pledge numbers were included in the contract?

A. I am not certain as to that.

Q. Did you return to Los Angeles shortly after your conversation? A. Yes.

Q. And it was shortly after you returned to Los Angeles that the Simons transaction came into existence? A. A very short time.

Q. You called Mr. Kleinman at San Francisco?

A. Yes.

(Testimony of Sol Zemansky.)

Q. You called him at Mr. Dienstag's home?

A. Either at his home or the office, I believe.

Q. You reached him through Mr. Dienstag?

A. Yes.

Q. The following day Mr. Kleinman and Mr. Dienstag came down to Los Angeles?

A. I believe it was the next day. [204]

Q. At that time, Mr. Zemansky, you told them that you were trying to work out a transaction, whereby Simons also could be secured, with Simons' attorney, Judge Pacht?

A. Yes.

Q. You asked Mr. Dienstag and Mr. Kleinman to accompany you, Mr. Dienstag so he could explain the law properly?

A. Yes.

Q. And they did accompany you to him?

Mr. Laugharn: To that last question, I didn't have the opportunity to object, but I would like to object to the question. The question is not clear and intelligible; explain the law, to whom; explain the law to Judge Pacht or to Mr. Kleinman or to this bankrupt?

The Referee: Will you ask another question?

Mr. Laugharn: I think that is important.

Q. By Mr. Wolver: You desired Mr. Dienstag to discuss the law with Judge Pacht, is that right?

A. Yes, I think the question before that stated about the Simons matter.

Q. And Mr. Dienstag and Mr. Kleinman accompanied you to Judge Pacht?

A. To Judge Pacht's office, yes.

(Testimony of Sol Zemansky.)

Q. That was the evening of the day they arrived in the city?

A. I think that was the day, I think so. [205]

Q. Is that your best recollection?

A. Yes.

Q. Do you recall who was at Judge Pacht's office at that time?

A. Judge Pacht, Mr. Kleinman, Mr. Dienstag and myself, and I think there was another attorney there in Judge Pacht's office; I am not certain as to that.

Q. And you heard Mr. Dienstag and Judge Pacht have the discussion? A. Yes.

Q. You don't recall exactly what was said?

A. No.

Q. More or less the law?

A. It was over my head; it was too much law.

Q. At that time Judge Pacht and his client agreed they would take security?

A. I believe it was determined on the basis of 50 per cent of the amount they had sued for to be secured. [206]

Q. Do you recall at that time a discussion concerning money that had been collected?

A. Collected, no.

Q. Do you recall asking Mr. Kleinman if you could use the money that had been collected on the contract of the 24th? A. I don't recall. [208]

Q. Do you recall a conversation at which Mr. Dienstag set forth the basis under which Mr. Klein-

(Testimony of Sol Zemansky.)

man's money could be used, or any fresh money that he brought forth could be used?

A. I can't recall it.

Q. Was anything said about a revolving security that night?

A. Something was mentioned on that line, about new contracts.

Q. Was there anything said about new contracts made, or the amount of money advanced or the amount of money used? [209]

A. Yes.

Mr. Chotiner: I move that the answer be stricken and object to the question as assuming facts not in evidence. It is compound, money advanced or used.

The Referee: What do you mean by that, Mr. Wolver, advanced or used?

Mr. Wolver: I am using the witness' own words. He said certain money would come in on redemptions, and we have discussed that further money would be advanced.

The Referee: Motion denied.

Q. By Mr. Wolver: Do you recall Mr. Dienstag stating that evening that all security that would be redeemed would have to be replaced by other security?

A. I don't recall that.

Q. Do you recall stating that all redemption money would have to be used for the acquiring of new pawns?

A. Yes, that the redemption money could be used for new pawns.

(Testimony of Sol Zemansky.)

Q. Mr. Kleinman at various times loaned to Zemansky Brothers various sums of money in I.O.U.'s?

A. He used to take an I.O.U. That's the way it was handled.

Q. Were all the I.O.U.'s finally evidenced by notes or were some repaid?

A. Some, I believe, were repaid and some notes issued, both. [210]

Q. As a matter of fact, Mr. Zemansky, didn't he at various times loan out sums of money on I.O.U.'s which were subsequently repaid?

A. I don't know as to the sums. There was money loaned on I.O.U.'s and he handed us back the I.O.U.'s and we gave him the money.

Q. That was done quite often? A. Yes.

Q. Do you recall on one occasion when the amount involved was \$15,000?

A. I don't recall it.

Q. Do you recall the incident when a diamond bracelet was presented to your company for a loan and Mr. Kleinman advanced \$15,000 to be loaned on that bracelet?

A. I recall the \$15,000 transaction, but I don't recall whether we obtained the money from Mr. Kleinman or not.

Q. What commodity was your firm dealing in?

A. Primarily diamonds and jewelry.

Q. You were only dealing in money to loan to others, isn't that so? A. Yes.

(Testimony of Sol Zemansky.)

Q. When your business was good and you had a great number of loans, that is the time that you were short on cash? A. That is correct.

Q. If business was bad, you would have a lot of cash [211] on hand?

A. Well, that would be the way it would operate.

Q. So at the various times that you told Mr. Chotiner that you were short on cash was when your business was good?

A. You better give me that question again.

Mr. Laugharn: I submit that that is unintelligible, that play on words is quite confusing as to what business was good.

The Referee: Overruled. It may stand.

Mr. Chotiner: I don't believe there was an answer given to the question.

The Referee: Read the question.

(Question read.)

A. Well, I could not answer that question in view of the present circumstances.

Mr. Wolver: I will withdraw the question.

Q. In the light of what you knew at that time, at the time you asked for the loans from Mr. Kleinman, did the lack of money, the available cash in the cash drawer, indicate that the loan business was good? A. Yes. [212]

Mr. Dienstag: May it be stipulated between counsel at this time—I don't remember if this was put in the form of a stipulation—that the copies of

(Testimony of Sol Zemansky.)

the contracts and notes now on file are duplicates of the originals which are now existing?

Mr. Chotiner: With the exception of the items which have not been conceded.

Mr. Dienstag: There is only one, the \$3700 note.

The Referee: The Court understands that to be the record.

Mr. Laugharn: Counsel stated that he prepared copies of the originals. I think we can safely agree that they are in evidence. [213]

The Referee: Very well. [214]

Q. By Mr. Wolver: Mr. Zemansky, do you recall the setting aside of the pledges for the contract of February 24th?

A. Well, the way I believe it was handled, I called Mr. Kravitz in and told him to set the loans aside.

Q. Were you present when that was done?

A. I don't believe I was.

Q. Were you present when the contract of March 2nd was segregated, the pledges that secured that?

A. I don't believe so.

Q. Do you recall ever observing the manner in which the pawns were segregated?

A. I have an idea how they were handled.

Q. How was it handled?

Mr. Chotiner: Objected to on the ground that it calls for the conclusion of the witness. He wasn't there.

(Testimony of Sol Zemansky.)

Q. By Mr. Wolver: If you know.

Q. By the Referee: What do you mean, you have an idea? Do you mean you were in the place at the time when they were doing it? [219]

A. No, but I knew the theory of it.

Q. How do you know, did someone tell you?

A. I could see the loans had been transferred from one drawer to another.

Q. After it had been done, you saw what was there? A. Yes.

The Referee: Overruled. Proceed. The answer was, after it was done he saw what was there.

Q. By Mr. Wolver: What did you see?

A. The loans were transferred from one drawer into another drawer and they were marked with a "K" on the face of the drawer.

Q. Did you observe the notations that were made to be copied into the contracts?

A. No.

Q. I believe you told Mr. Chotiner that the Citizens Bank and the Wulfsons had received security prior to this time? A. Yes.

Q. The Zemansky Brothers had other property in addition to the Provident Loan and the State Loan?

A. Yes, they had some other interests.

Q. And what were those other interests at that time?

(Testimony of Sol Zemansky.)

Mr. Chotiner: Objected to on the ground that it is immaterial and not proper cross-examination.

The Referee: Overruled. [220]

A. I don't know what they all were. They are in the original schedule of holdings.

Q. Where were the books of the Zemansky Brothers kept?

A. We had a set of books at the Provident pertaining to anything that happened at the Provident, and then there was also a set of books at the State Loan, at 558 Main Street.

Q. Where were the books kept that showed these other interests other than the Provident and the 558? A. At the 558 store.

Q. You had some property in Glendale; what books was that shown in?

A. That was shown in the 558 records.

Q. What books did you have at the Provident?

A. The pledge books pertaining to the pledge business, and the cash book or day book, a book similar to this.

Q. Did you have any other books at the Provident? A. No.

Q. What books did you have at 558?

A. We had books pertaining to the business at the 558 store.

Q. Were these books accessible to Mr. Kleinman, referring to the 558 store books?

A. No, not the 558. [221]

(Testimony of Sol Zemansky.)

Q. Did you have an interest in the 333 Club at El Cerritos, California? A. Yes.

Q. And how long did you have that interest?

Mr. Chotiner: We are going to object to this line of questioning on the ground that it is immaterial and not proper cross-examination. I don't see the materiality of it.

The Referee: Overruled.

Q. By Mr. Wolver: How long did you have that interest?

A. About three or four years.

Q. Do you have an interest in the Playhouse Fascination at Butte, Montana?

A. Part of an interest my brother Joe had.

Q. You had a portion of the interest?

Mr. Laugharn: May it please the Court, I believe that question should be more definite, whether or not he means the partnership had that interest or this witness as an individual.

The Witness: The partnership.

Mr. Wolver: The partnership.

The Referee: All right. [222]

Q. By Mr. Wolver: How long had you had that interest?

A. I don't know the exact length of time.

Q. You had an interest, the partnership had an interest, in the Club Fortune? A. Yes.

Q. And that is located at Reno, Nevada?

A. Yes sir.

(Testimony of Sol Zemansky.)

Q. How long have you had that interest?

A. Three years.

Q. The partnership had an interest in the Redondo Properties Corporation? A. Yes.

Q. And that corporation had considerable real estate? A. Yes.

Q. How long had you had that interest?

A. About three years.

Q. The partnership had an interest in the Palace Amusement enterprise? A. Yes.

Q. How long did you have that interest?

A. About four or five years.

Q. The partnership had an interest in the Redondo Palace? A. Yes.

Q. How long did you have that interest?

A. About three years. [223]

Q. The partnership had an interest in the Neptune at Long Beach? A. Yes.

Q. How long did you have that interest?

A. About a year.

Q. The partnership had an interest in Robbins' Bingo at Bayshore in San Mateo County, is that correct? A. Yes sir.

Q. You also owned the real estate there?

A. Yes.

Q. And how long did you have that interest? [224] A. About four years.

Q. By Mr. Wolver: The partnership had an interest in the Boulevard at Belmont Shores?

(Testimony of Sol Zemansky.)

A. Yes.

Q. How long had you had that interest?

A. About two years.

Q. The partnership had an interest in a piece of real property in Glendale bordered by San Fernando, Los Feliz and Central Avenue?

A. Yes.

Q. What was the cost of that piece of property?
Mr. Chotiner: Objected to on the ground that it is immaterial.

The Referee: Overruled.

A. \$120,000.

Q. By Mr. Wolver: How long did you have that place?
A. About 15 years.

Mr. Chotiner: That assumes a fact not in evidence, that he had that place.

The Referee: Overruled.

Q. By Mr. Wolver: How long did the partnership have it?
A. About 15 years.

Q. By Mr. Wolver: Mr. Zemansky, did you keep a permanent record or any record of any unredeemed pledges?
A. No. [225]

Q. Did you keep any inventory of any precious gems or other merchandise on hand?
A. No.

Q. Could you tell at any time how much merchandise or how many unredeemed pledges you had on hand?
A. No.

Q. Did you have large amounts of them?

A. At various times we have large amounts.

(Testimony of Sol Zemansky.)

Q. Did that amount to an appreciable sum, such as hundreds of thousands of dollars?

A. Yes. [226]

KLEINMAN'S EXHIBIT No. 1

No. 75000

Time—S., A., H., B., C., C. & S. of B., C. & S. of D.

Los Angeles, Calif.,.....

Under the terms and conditions herein set forth, and in consideration of Dollars (\$.....) to me loaned by the firm of State Loan Office, I hereby pledge and deliver to them as security for the repayment of said loan, together with interest thereon, at the rate ofper cent per month, from date hereof, the following described property, to wit:

I hereby promise to repay said loan, together with interest, at the office of State Loan Office, Los Angeles, Calif., one month after date of this instrument; this loan is made and accepted under the terms and conditions provided for in Sections 2 and 3 of Chap. 538 Stats. 1935, State of California, copies of the same being printed on the reverse side hereof and are hereby made a part hereof. I Have Read the Law Printed on the Reverse Side Hereof Relative to Interest Charges and Period of Redemption and Understand the Purport Thereof; pay-

(Testimony of Sol Zemansky.)

ment of any sum or sums after the date of the maturity of this note shall not extend or change the terms of said loan or this note unless expressed in writing on the face thereof; I hereby declare and warrant that I am the sole and absolute owner and or have the authority to pledge the above described property; and I hereby agree that the firm of State Loan Office shall not be responsible to me or my assigns for loss occasioned by fire, theft, robbery, hold-up, act of God or public enemy, and that their responsibility shall in no event or at any time exceed twenty-five per centum in addition to the amount loaned; I expressly waive diligence, demand, presentment for payment and notice of sale; if this instrument is executed by an agent the principal agrees to all of the above terms and further agrees that he is bound by all the subsequent acts of the said agent. The delivery of this pledge to the original pledgor with or without this receipt relieves the pledgee of all liability to any and all persons.

Signed.....
Address.....
Phone.....

(Reverse Side)

Interest Paid to	Date of Payment	Remarks
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(Followed by ruled form not filled in.)

(Testimony of Sol Zemansky.)

STATE LOAN OFFICE

558 South Main Street

No. 75000

Los Angeles, Calif.,.....

If You Wish to Sell This Ticket Consult Us First
Positively No Goods Delivered on Checks

Under the terms and conditions herein set forth,
and in consideration of.....
Dollars (\$.....) to me loaned by the firm of
State Loan Office, I hereby pledge and deliver to
them as security for the repayment of said loan, to-
gether with interest thereon, at the rate of.....
per cent per month, from date hereof, the following
described property to-wit:.....
I hereby promise to repay said loan, together with
interest, at the office of State Loan Office, Los An-
geles, Calif., one month after date of this instru-
ment; this loan is made and accepted under the
terms and conditions provided for in Sections 2 and
3 of Chap. 538 Stats. 1935, State of California,
copies of the same being printed on reverse side
hereof and are hereby made a part hereof. I Have
Read the Law Printed on the Reverse Side Hereof
Relative to Interest Charges and Period of Redemp-
tion and Understand the Purport Thereof; payment
of any sum or sums after the date of the maturity
of this note shall not extend or change the terms of
said loan or this note unless expressed in writing on

(Testimony of Sol Zemansky.)

the fact thereof; I hereby declare and warrant that I am the sole and absolute owner and or have the authority to pledge the above described property; and I hereby agree that the firm of State Loan Office shall not be responsible to me or my assigns for loss occasioned by fire, theft, robbery, holdup, act of God or public enemy; and that their responsibility shall in no event or at any time exceed twenty-five per centum in addition to the amount loaned; I expressly waive diligence, demand, presentment for payment and notice of sale; if this instrument is executed by an agent the principal agrees to all of the above terms and further agrees that he is bound by all the subsequent acts of the said agent. The delivery of this pledge to the original pledgor with or without this receipt relieves the pledgee of all liability to any and all persons.

This receipt will not be honored by us unless signed by person who left above described goods.

No Goods Sent C. O. D.

To Redeem Pledgor Must Sign Here—

Signed.....

If you wish the time extended, send the interest due, and give the number of this ticket.

Clothing, wearing apparel, furs, trunks and suitcases or property of similar character can be redeemed within 7 Months from date issued. Diamonds, watches and jewelry can be redeemed within 13 Months from date issued.

Interest Payable Monthly.

(Testimony of Sol Zemansky.)

(Reverse Side)

State Loan Office

Sections No. 2 and 3 of Chap. 538, Stats. 1935

Section 2. It shall be a misdemeanor for any pawnbroker to charge or receive compensation at a rate in excess of three per cent per month on loans not exceeding three hundred dollars, or in excess of two per cent per month, on loans in excess of three hundred dollars, except that a Minimum Charge of Fifty Cents Per Month may be made in any case where the monthly charge permitted by this section would otherwise be less than fifty cents. [Printer's Note: Paragraph not legible because of holes being punched through printed matter.]

Section 3. Every pawnbroker shall retain in his possession every article pledged to him, except clothing, wearing apparel, furs, trunks and suit cases, and articles of similar character, for a period of one year after the last date fixed by his loan contract for redemption. He shall keep such exempted articles for a period of six months after the last date fixed for redemption by his loan contract.

The pledgor or his assigns may redeem the articles at any time during such period. If such article is not redeemed within the period thus allowed, the pawnbroker shall at the end of that period become vested with all right, title, and interest of the pledgor or his assigns therein, to hold and dispose of as his own property. All provisions of law relating to pledges and foreclosure of pledges in con-

(Testimony of Sol Zemansky.)

flict with this act shall not apply to pledges with pawnbrokers under this act. It shall be a misdemeanor for any pawnbroker to violate any provision of this section.

Below appears the date to which this note has been extended.

Interest Paid to	Date of Payment
(Followed by ruled printed form not filled in)	

How to Redeem If Out of Town

Sign this ticket, hand with amount due to Railway Express Agency, and they will collect and forward goods to you.

Fifty Cents Charges for Packing

[Endorsed]: Filed Aug. 22, 1940.

Mr. Wolver: Mr. Zemansky, when a loan was made on a pawn, the amount loaned on the pawn never equalled the value of the pawn?

A. No.

Q. It would be, in all events, less than the value of the pawn? A. Yes.

Q. And whenever Mr. Kleinman sold pawns for you, he always sold them at an amount greater than the amount you had in them by reason of prior loans?

A. There may be an occasion when we had a loss.

(Testimony of Sol Zemansky.)

Q. Do you recall any such case? A. No.

Q. Would it be fair to say with the exception of a possible few occasions, all other pawns were sold by him, any redeemed pawns, were sold at a profit? A. Yes. [234]

Re-Direct Examination

By Mr. Chotiner: [235]

Q. I believe you testified on cross-examination that you noticed a difference in Mr. Kleinman's health during the time that he was associated at the Provident Loan Association. Now, Mr. Zemansky, did you notice what his condition was beginning with the 1st of January, 1939, up to February 24, 1939, as to his state of nervousness?

A. Well, I wouldn't be qualified to answer that.

Q. Well, can you tell us what Mr. Kleinman's demeanor was as to the manner in which he walked at the Provident Loan Association during that period of time?

Mr. Wolver: That is objected to as being incompetent, irrelevant, and immaterial.

Mr. Chotiner: If the Court please, I am going to develop this.

The Referee: Can you answer that question?

A. I never noticed any difference. [236]

Q. Mr. Zemansky, directing your attention to the night when the Simons security was set aside for Simons, who was there at the Provident Loan Association so far as the Simons people were concerned?

(Testimony of Sol Zemansky.)

A. I believe Mike Lyman was there and Bill Simon and an attorney from Judge Pacht's office by the name of Ross, myself, Dave Zemansky, Abe Zemansky, Mr. Kleinman and Mr. Dienstag.

Q. Was Judge Pacht there that night?

A. I don't think he came over.

Q. You say Bill Lyman was there. Will you tell us approximately how much Mr. Lyman weighs.

A. You mean Bill Simon?

Q. Bill Simon.

A. If you ask me, I would say close to around 425 pounds.

Q. About how tall is he?

A. Close to six feet.

Q. Now, during the time that all those parties were present there, was there a discussion among you as to the giving of security to the Simons people?

A. When they came there that night, it had already been agreed on. [237]

Q. Was there ever any discussion after that, that night there?

A. There were several minor discussions.

Q. What were those minor discussions?

Mr. Dienstag: What about the question of Mr. Simons' weight and height.

Mr. Chotiner: It will develop very shortly. I can only take one thing at a time.

The Referee: What were the minor discussions you refer to?

A. There were several. It seems they had come

(Testimony of Sol Zemansky.)

up there for the purpose of reading the agreement. There were several objections and changes made in there, and that is about all the discussions there were.

Q. By Mr. Chotiner: Were there any loud voices used there that night?

A. Yes, I believe several times they spoke above a whisper.

Q. When you say they spoke above a whisper, to whom are you referring?

A. To Simon and Lyman.

Q. That includes one of the big fellows, is that right? A. Yes.

Q. When you say they were speaking above a whisper, we might have some levity, would you say it was in a loud [238] voice?

A. That is right.

Q. And that could be heard all over the second floor of the Provident Loan Association, is that right?

A. And the adjoining buildings also.

Mr. Wolver: I assume this levity is necessary, and unless it is more apparent and connected with this case than it is now, we can move to strike.

The Referee: It hasn't helped or hurt anybody so far.

Q. By Mr. Chotiner: Now, Mr. Zemansky, what was it that Mr. Simons said in this loud voice?

A. One of the prior discussions was as to the payment and the amount of money that was to be paid. We wanted to divide it over a period of 12

(Testimony of Sol Zemansky.)

months. That was one of the points of the discussion.

Q. What was it Mr. Simons said in that loud voice?

A. He said, "You would have to pay off or else." I believe that was about the substance of it.

Q. What did Mr. Simons say; did he say anything else besides "or else" in a very loud voice?

A. I can't recall anything else at present.

Q. When he told you you had to make the payment in one amount, what did you say, if anything?

A. I still wanted it my way.

Q. What did you tell him?

A. It couldn't be done that way. [239]

Q. When you told him it couldn't be done that way, did Mr. Simons' voice still continue loud?

A. Quite loud at all times.

Q. What did he say after you told him it couldn't be done that way?

A. I said my theory was correct.

Q. Your theory being correct, you mean you could not pay any more than you said you could pay?

A. Yes.

Q. During the time these conversations were taking place, Mr. Kleinman was present at the Provident Loan Association, is that correct?

A. He was on the floor but I don't think he was in the room. [240]

Q. By Mr. Chotiner: Did you say anything to Judge Pacht as to your ability to pay off the entire amount at that time?

A. I can't recall.

(Testimony of Sol Zemansky.)

Q. For the purpose of refreshing your memory, isn't it true that you told Judge Pacht you were financially unable to pay the money then?

A. Oh, yes, I told him I was not able to pay it then, certainly. [242]

Q. Now, the following day in your office, who was present?

A. I believe it was the following day or evening. Mike and Bill Simons, and myself and my two brothers.

Q. This conversation took place from 7 at night until around midnight? A. Yes.

Q. When the conversation started that night, were demands made of you for payment of the full amount?

Mr. Wolver: That is objected to as being hearsay. He has already stated Mr. Kleinman, if there, was in a separate room.

The Referee: How are you going to bring Kleinman in on this?

Mr. Chotiner: By the loud voices that were used, your Honor.

The Referee: All the time?

Mr. Wolver: Mr. Kleinman was having a nervous relapse at that time, your Honor.

Mr. Chotiner: If that is in the form of a stipulation, we will accept it.

The Referee: Objection overruled.

The Witness: What was the question? [243]

(Question read.)

(Testimony of Sol Zemansky.)

A. Yes, they always wanted the full amount.

Q. By Mr. Chotiner: Was that said in a loud voice? A. I don't recall.

Q. By the time you left there around midnight, had you reached an understanding with the Simons people as to the manner and method of payment?

A. Yes.

Q. Was that different from the manner that the Simons people had been asking for?

Mr. Wolver: Objected to as being incompetent, irrelevant, and immaterial.

The Referee: Overruled.

A. There were certain modifications.

Q. By Mr. Chotiner: Were the modifications that you were going to make for a payment plan instead of all at once?

A. On a payment plan.

Q. Now, directing your attention to the testimony on cross-examination about a revolving fund for money that would be advanced or used, in connection with the Kleinman transaction, what do you mean by that?

A. What I meant by that was the money that would accumulate from redemptions was going to be used to take in more loans, new loans.

Q. Now, when a redemption was made of a pledge that [244] had been given to Mr. Kleinman as security, and that pledge was withdrawn from the Kleinman security, did you have on hand any other pledges that could have been used to replace the one that had been withdrawn?

(Testimony of Sol Zemansky.)

A. Well, I don't know.

Q. Well, did you have any pledges in your place of business, other than those that had been rehypothecated to other individuals?

A. Yes.

Q. Then I take it, at the time when a pledge was withdrawn from the Kleinman security, you did have another pledge in the room there, is that correct?

A. Yes.

Q. Of approximately the same amount?

A. Yes, that is correct.

Q. Directing your attention to your examination and testimony on cross-examination that when business was good, you were short of cash. Now, every time that you were short of cash within six months prior to February 24, 1939, was that a result of business being good?

Mr. Wolver: That is objected to as being incompetent, irrelevant, and immaterial, not proper cross-examination.

Mr. Chotiner: Redirect.

Mr. Wolver: Not proper redirect examination, in that we limited our statement to no definite period.

The Referee: Overruled. [245]

The Witness: I imagine the rule would be, business would be good. In this case it wasn't. [246]

Q. What was the reasonable market value of your individual assets during 1938, and up to February 24, 1939?

(Testimony of Sol Zemansky.)

A. My own individual assets?

Q. Yes.

A. Not a thing except my automobile.

Q. That was worth under a thousand dollars?
[250]

Mr. Wolver: That is objected to as leading and suggestive.

The Referee: Well, what was it worth?

A. About \$1500.

Q. By Mr. Chotiner: You testified on cross-examination that at various times you had large amounts of unredeemed pledges. Now, then, directing your attention to the period of six months prior to February 24, 1939, did you have large amounts of unredeemed pledges?

A. Not at that time. [251]

Recross-Examination

By Mr. Wolver:

Q. When you referred to a revolving security, didn't you mean that the money that would come in from redeemed accounts would be used to acquire pledges?

A. Yes, that was my understanding of it.

Q. And in that manner the security would be immediately replaced?

A. Yes, for example, we would always give new security.

Q. Mr. Zemansky, in answer to Mr. Chotiner's question you stated that the lack of money during the last six months was not by reason of good

(Testimony of Sol Zemansky.)

business. Did you know it at that time, during this six months period? Or during that period prior to February 24th, did you know at that time that the lack of money was due to no reason other than good business?

A. I knew we were refusing business. Loans were being offered, but we were unable to make them.

Q. Was that because a great number of loans were being [254] presented to you?

A. No more than the regular average.

Q. Did you know that the lack of funds at that particular time was for any different reason than was theretofore the reason for lack of money?

A. That question is not quite clear.

Q. I will withdraw it and try to clarify it. During that six months period prior to February 24, 1939, when you were refusing new loans for lack of money, did you know that the lack of money was a result of any condition in regard to your business other than it was from the condition prior to that six months period?

A. I didn't know. [255]

Q. How long did it take you to prepare your schedules in this case, your bankruptcy schedules?

A. How long?

Q. Yes.

A. I don't know the dates. It was filed in a skeleton way. [256]

Q. You didn't have that information available until you started to prepare these schedules?

(Testimony of Sol Zemansky.)

A. No.

Q. You didn't know your financial condition prior to that time? A. No.

Redirect Examination

By Mr. Chotiner:

Q. Did you understand that Mr. Dienstag and Mr. Ross were to collaborate in the drawing of the Simons agreement?

A. The way I understood it was that Mr. Dienstag was to work out his theory of it with Mr. Ross. That was about the way it was.

Q. Was Mr. Dienstag representing you in connection with the Simons matter?

Mr. Wolver: That is objected to.

Mr. Laugharn: I think we ought to have a direct answer to that.

The Referee: The witness can explain his answer if he wants to.

A. Well, I can say this, that I never employed him as my attorney. He was a son-in-law of Mr. Kleinman. He [257] never received pay from me.

Q. By Mr. Chotiner: In other words, Mr. Dienstag, in working with Mr. Ross in the preparation of this agreement, was looking out after your side of the case, is that right?

Mr. Wolver: That is objected to as calling for the conclusion of the witness.

The Referee: Overruled.

A. I would say that was the situation, because I had no other attorney to review the papers. [258]

(Testimony of Sol Zemansky.)

Recross-Examination

By Mr. Wolver:

Q. Mr. Dienstag never represented you as attorney?

Mr. Chotiner: That is objected to as calling for the conclusion of the witness.

The Referee: Overruled.

A. I just tried to explain the situation as to how he appeared. He went down to talk the matter over with [259] Judge Pacht. Mr. Dienstag was endeavoring to work out a contract with Mr. Ross. He never received any fees from me; nevertheless, I relied on his judgment because I had no other attorney to look it over.

Q. Mr. Dienstag never presented any bill to you, did he? A. No.

Q. He never appeared in a court proceeding for you? A. No.

Q. By the Referee: Mr. Zemansky, did Mr. Kleinman ever actually leave your employ, in other words, was he ever off the pay roll?

A. I don't think he was.

Q. You don't think he was? A. No.

Q. Was he away from the place of business for any extended period of time?

A. Yes, he used to go up to San Francisco quite often, staying two or three days, sometimes a week.

Q. Was he away more than a week at a time?

A. I think so.

(Testimony of Sol Zemansky.)

Q. That was always with your permission?

A. Yes sir. [260]

Q. So far as you know, he remained on the pay roll at that time?

A. Yes. My brother Dave wrote the checks, so he would know definitely.

Q. You really don't know whether he was on the pay roll?

A. I am inclined to think he was always on the pay roll.

Q. The record shows that the attachment by Simons was levied February 27, 1939. I assume that before the actual attachment was levied you had some demand from Simons for payment of their money?

A. No, that is not entirely correct.

Q. It is not?

A. I had a conversation with him, and then it was we changed over the notes to six per cent. That was done about 30 days prior to the filing of this case. At the time those notes were changed, I really believed it was going to be all right, that they would go along with me, so when the suit came, I was very much surprised.

Q. What I am getting at, was the attachment the very first notice you had that Simons wanted his money at that time? A. Yes.

Q. There had been no demand on you?

A. No demand. [261]

(Testimony of Sol Zemansky.)

Q. This instrument, which is in evidence as Trustee's Exhibit 4—may I ask, gentlemen, if this is merely a copy or is that an executed original?

Mr. Wolver: That is an executed original. May I see it to be sure? No, this is a copy.

The Referee: Do you have the original?

Mr. Laugharn: I don't know whether this is an original or not. This has Mr. Kleinman's signature on it, but as to whether or not it is entirely executed as an original, it does not seem to be.

Q. By the Referee: Mr. Zemansky, this instrument bears date February 24, 1939. You previously testified you signed it in the City of San Francisco? A. Yes.

Q. Did you sign it on the 24th day of February, 1939?

A. The only way I would be able to tell, I would have to find out from the St. Francis the date I was there, at the St. Francis Hotel. That's the only way I can fix the exact date.

Q. You don't know whether you signed it on the 24th or [262] not? A. I don't know.

Q. When you signed it, had it been signed by any of the other parties to the contract?

A. You mean by my two brothers?

Q. Your two brothers and Mr. Kleinman.

A. I don't recall whether Mr. Kleinman signed it right there or not, but my two brothers, Dave and Abe, signed it in the office of the Provident the night that the Simons boys had their conver-

(Testimony of Sol Zemansky.)

sation there. That is the night their signatures were affixed to it.

Q. Then they signed it after you did?

A. After I did, yes.

Q. Now, how long did you remain in San Francisco on that trip?

A. I believe I was there two or three days.

Mr. Laugharn: Did the Court fix the date of that evening?

The Referee: No, I was just coming to that.

Q. You don't know whether you stayed there more than two or three days?

A. I don't know.

Q. How long had you been there when you signed the agreement?

A. The following morning.

Q. The day after you got there? [263]

A. If I got in that morning, I signed it then; if I got in that night, if I drove in the machine, the following morning I signed the contract.

Q. Would you happen to remember the day of the week it was? A. No, I don't.

Q. When you returned to Los Angeles, was your place under attachment? A. No.

Q. How long after you returned to Los Angeles did the Sheriff walk in?

A. A few days after.

Q. A few days after? A. Yes. [264]

Q. You already testified, when you learned of the attachment, you telephoned to Mr. Kleinman long distance? A. Yes.

(Testimony of Sol Zemansky.)

Q. You don't know whether he was up there while you were there, or whether he went up after you came down, or just how he came up?

A. I don't know.

Q. You don't know? A. No.

Q. But naturally you knew he was in San Francisco when you called him there? [266]

A. I called him in San Francisco.

Mr. Laugharn: From the general questions of the Court, apparently one date in question can now be established with certainty, and that is that the date upon which this witness registered at the St. Francis Hotel is the same date as the date when he actually signed this contract.

The Witness: If I went in my machine, it would be the following day. If I went up on the train it would be the same day. [267]

LEO KRAVITZ

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

The Referee: Your name, sir, is what?

The Witness: Leo Kravitz.

Direct Examination [271]

By Mr. Chotiner:

Q. How long did you work at the Provident Loan Association office? A. Five or six years.

(Testimony of Leo Kravitz.)

Q. Was that the last five or six years prior to the bankruptcy proceedings? A. Yes sir.

Q. What was the nature of your duties?

A. Loan clerk.

Q. By Mr. Chotiner: Do you know Mr. Sam Kleinman? A. I do.

Q. How long have you known him approximately? A. 10 or 12 years. [272]

Q. What were the duties of Mr. Kleinman at the Provident Loan Association during the last two years that the place was in business?

A. Selling diamonds, working here and working there, all over.

Q. When you say "working here and working there and all over," what does that comprise?

A. He was making loans once in a while, and selling jewelry to people, once in a while and selling diamonds.

Q. Was there an employee there at the Provident by the name of Harry Cussick? A. Yes sir.

Q. And when did he leave his employment at the Provident?

A. Oh, about a year or so before the bankruptcy.

Q. And in relation to the time that Mr. Cussick left the employ of the Provident, what were Mr. Kleinman's duties after that?

A. The same as it was before he left the Provident.

Q. And did he spend very much time as a loan clerk [273] after Mr. Cussick left the employ?

A. He spent a little more.

(Testimony of Leo Kravitz.)

Q. Now, during the time that Mr. Kleinman was working there as a loan clerk, did you notice whether he ever looked in the cash drawer?

A. Just off and on.

Q. By off and on, would you relate the circumstances under which he would look in the cash drawer?

A. Well, he came down in the morning, talked to me a little bit, and then walked over to the cash drawer and looked into it.

Q. Did he look into the cash drawer at times when there was no customer there to borrow money?

A. Yes, he looked in there, then he looked in there when there was a customer in there to borrow money.

Q. And what was the cash drawer used for, what purpose did the cash drawer serve?

A. To pay money out.

Q. Was there any other place at the Provident where money was kept for the purpose of making loans other than the cash drawer? A. 558.

Q. That is, 558 South Main Street, you are referring to? A. Yes sir.

Q. But at the Provident Loan Association office, was [274] there any other place other than the cash drawer?

A. No sir, not that I know of.

Q. Do you remember the occasion when pledges were set aside for Mr. Kleinman?

A. I do.

(Testimony of Leo Kravitz.)

Q. And was that sometime around February 24, 1939? A. Around that time, yes.

Q. Now, prior to the time when the security was first set aside for Mr. Kleinman, who had to open up the vault and the vault door in the morning?

A. I opened it and my brother-in-law opened it.

Q. Who is your brother-in-law?

A. Mr. Sego.

Q. Where was the key kept prior to the time that the security was given to Mr. Kleinman?

A. Right in a little drawer in the desk, but you pressed a button for the gate.

Q. Now, prior to the time that the security was given to Mr. Kleinman, did Mr. Kleinman ever open the vault or the vault door, to your knowledge?

A. You mean open up the vault?

Q. Yes. [275]

A. No sir.

Q. Now, after the security was given to Mr. Kleinman, did you follow the same proedure in opening up the vault and the vault door as you did before? A. Yes sir.

Q. Was the key kept in the same place?

A. Yes sir.

Q. Was that key available to all the employees of the Provident? A. Yes sir.

Q. Did you ever have any conversation with Mr. Kleinman prior to his obtaining security on the subject of available money at the Provident?

A. I don't know what you mean.

(Testimony of Leo Kravitz.)

Q. By available money, I mean money sufficient with which to make loans.

A. You mean, if I didn't have any money in the cash box, is that the question you want to ask me?

Q. I want to know whether you and Mr. Kleinman ever said anything to one another regarding that subject.

A. When we needed money I used to go to Mr. Kleinman to get a little money to make a loan. If he didn't have it I would call up Dave Zemansky.

Q. Did Mr. Kleinman ever say anything to you about the condition of the cash drawer?

A. He used to look in it once in a while. He says, [276] "Are you going to make a loan?"

Q. Prior to the time that Mr. Kleinman first obtained the security, did you ever have any conversation with Mr. Kleinman regarding the subject of there not being sufficient money in the cash drawer?

A. Off and on, yes sir.

Q. What was that conversation or conversations?

A. Well, Mr. Kleinman looked in the cash drawer and there was no money to make a loan. I said, "Well, I will get in touch with Dave," and Dave used to send him up some money.

Q. What did Mr. Kleinman say, if anything?

A. Then if a loan should happen to come in be-

(Testimony of Leo Kravitz.)

fore Dave would send him up some money I used to go to Mr. Kleinman and ask him for the money.

Q. What did Mr. Kleinman say on those occasions, if anything?

Mr. Wolver: Before you have that answered, may we have that point marked?

The Referee: Yes.

Q. By Mr. Chotiner: What did Mr. Kleinman say, if anything, on those occasions when you would ask him for money? A. Get it off of Dave.

Q. Were there ever occasions when you would call up Dave for money and Dave did not send it up, and a customer [277] would come in to make a loan?

A. Yes, then I would go over and ask Mr. Kleinman for the money.

Q. Did those occasions ever happen?

A. Very often.

Q. And did Mr. Kleinman always give you the money then? A. Not all the time.

Q. Did Mr. Kleinman ever refuse to give you any money with which to make loans when you asked him for it? A. Once in a while.

Q. Was that prior to the time that the security was set aside for Mr. Kleinman?

A. Before and after. [278]

Q. Well, for the purpose of refreshing your memory, isn't it true that Mr. Kleinman told you on an occasion before the security was set aside for him, that he had a business proposition he

(Testimony of Leo Kravitz.)

would like to submit to the Zemanskys, and you told him there was no sense in doing it, as they didn't have any money?

A. That the Zemanskys didn't have any money?

Q. Yes. Did you ever tell that to Mr. Kleinman? [279] A. No sir.

Q. By Mr. Chotiner: Were there occasions prior to Mr. Kleinman obtaining security, when loans were refused to customers for the reason that there was not sufficient money in the cash drawer with which to make the loans?

A. I don't quite understand that question.

Q. Well, did you ever turn down loans because there was not sufficient money in the cash drawer?

A. Yes sir.

Q. Was that before Mr. Kleinman got the security? A. Yes sir.

Q. And were there very many occasions like that? [280] A. Off and on.

Q. And did those occasions arise after you had called Dave Zemansky for money?

A. Yes sir.

Q. And did those occasions arise after you asked Mr. Kleinman for money? A. Yes sir.

Q. Did Mr. Kleinman ever say anything to you about his difficulty in having his account taken care of in any way?

Mr. Wolver: That is objected to as being uncertain and ambiguous.

The Witness: What account?

(Testimony of Leo Kravitz.)

Q. By Mr. Chotiner: The money that was owing to him [281] by the Zemanskys.

The Referee: The objection is overruled.

A. I never knew he had any difficulty. He had never spoken to me anything about his account.

Q. By Mr. Chotiner: All I am trying to find out is this, whether you remember any conversation of any kind had with Mr. Kleinman and yourself regarding the subject matter of the business relationship between Kleinman and the Zemanskys.

A. Well, the only business transaction I had with Mr. Kleinman was, Mr. Kleinman told me to keep the numbers right on the pledges. [282]

Q. By Mr. Chotiner: Were there occasions when there wasn't very much for the employees to do? A. Yes sir.

Q. And they would sit around and talk, is that correct?

A. Yes, we used to sit around and talk.

Q. Did you and Mr. Kleinman ever sit around and talk on any of those occasions?

A. We used to talk about diamonds and the loans.

Q. Did you ever talk about the condition of the business at the Provident?

A. Yes, we talked about it.

Q. What was your conversation?

A. The condition of the business and how you are going to make loans.

Q. Who said that?

(Testimony of Leo Kravitz.)

A. There is no money in the till, Mr. Kleinman used to say that.

Q. Give us the rest of the conversation.

A. I said, "Well, Sam, if we can't make any loans, I will get some money off of Dave or get a little money off of you if a loan comes in." In the meantime, a redemption would come in and I would loan that money, and I wouldn't have to ask him. This is just casual talk we used to have [284] all day long.

Q. Did those conversations take place prior to the time that security was set aside for Mr. Kleinman?

A. Before and after.

Q. Now, did you ever have any conversation with Mr. Kleinman before the security was set aside for him, regarding the subject matter of the Zemanskys being able to operate the Tango games.

A. Off and on.

Q. What was that conversation?

A. He used to ask me once in a while if that was going to open up.

Q. What did you say, if anything?

A. I told him they would probably be opened up in about a week or so.

Q. Give us the rest of the conversation.

A. That is about all.

Q. Did you ever talk with Mr. Kleinman about the subject of if the Tango games were operated, that the Zemanskys could work things out?

(Testimony of Leo Kravitz.)

A. I told him that if the Tango games would open, it would be a great help to the firm.

Q. What did Mr. Kleinman say to that, if anything?

A. He said, "It will be all right."

Q. And did those conversations take place before the security was set aside for Mr. Kleinman?

[285]

A. Before and after.

Q. Now, did Mr. Kleinman ever tell you that if the Zemanskys were able to operate the Tango games they could work things out, otherwise they could not?

A. He told me—what was that question?

The Referee: Read it, please.

A. I don't think he told me that.

Q. By Mr. Chotiner: Now, then, directing your attention to the time when the security was set aside for Mr. Kleinman, who told you to do it?

A. Sol Zemansky.

Q. And who was present when the security was set aside for Mr. Kleinman?

A. Mr. Dienstag, Mr. Sego; that's about all.

Q. Where was the transaction handled?

A. At the Provident Loan Association.

Q. Was that in the daytime or at night?

A. Right after dinner.

Q. Pardon me; I didn't hear the answer.

A. Right after dinner.

Q. Was that after the Deputy Sheriff had been in there?

(Testimony of Leo Kravitz.)

The Referee: Just a second. The Court has to know what this gentleman means by dinner. Some people still eat their dinner at noon. What do you mean? A. 7 o'clock. [286]

The Referee: 7 o'clock in the evening.

Mr. Wolver: May I have that last question again?

(Question read as follows: "Was that after the Deputy Sheriff had been in there?")

Mr. Wolver: I am going to object to that question on the ground that it assumes something not in evidence. There is no testimony whatsoever about the Deputy Sheriff being there before the first security was picked out for Mr. Kleinman. There was a Deputy Sheriff there at the time of the Simon transaction, March 1st or 2nd.

The Referee: I know, but there is evidence here that there was a Deputy Sheriff in there at some time or other, and this question was before the Sheriff went in there.

Mr. Wolver: I think he said while the Sheriff was there.

Mr. Chotiner: I asked whether it was after the Sheriff was there.

The Referee: The objection is overruled. Perhaps we should find out definitely whether this gentleman knows anything about the Sheriff being there.

Q. By Mr. Chotiner: Do you recall the Deputy Sheriff being at the Provident Loan Association around that time?

(Testimony of Leo Kravitz.)

A. Not around that time.

Q. When was it that the Deputy Sheriff came into the place? A. Why, after that time. [287]

Q. In other words, the Kleinman security was set aside for him before the Deputy Sheriff came in? A. Yes sir.

Q. Now, will you explain to the Court the procedure that you followed in setting aside the security for Mr. Kleinman, just exactly how you handled the jewelry and the boxes and what was done on that occasion?

A. I went in the vault and got the largest loans. We got about five or six drawers of loans, which amounted to \$100,000, I think.

Q. Where did you take them?

A. We put them in the corner.

Q. In what corner?

A. I think the northeast corner of the vault.

Q. Before you put them in the northeast corner of the vault, did you take the drawer of pledges from the vault to any other office?

A. I think I took them in to Miss Brown's office.

Q. What did you do when you got to Miss Brown's office?

A. I gave them to Mr. Dienstag and he ran them up on the adding machine.

Q. When you say you gave them to Mr. Dienstag, what do you mean by that?

A. He ran the amount on the adding machine.

(Testimony of Leo Kravitz.)

Q. Who would call off the amounts?

A. I think I called the amounts. [288]

Q. And who held the drawer of pledges at the time you were calling off the amounts?

A. I think I gave them to him, I would give it to him, and he would put it in another drawer, if I am not mistaken.

Q. Was the physical possession of the box ever turned over to Mr. Kleinman or Mr. Dienstag while you were running off those pledges?

A. What do you mean by "physical"?

Q. Did you ever give the box with the pledges to Mr. Kleinman or to Mr. Dienstag?

A. When we finished, I had the pledges, he had all the amounts and everything else, and I told him I would put them in a certain corner, I would put them in that corner.

Q. Who put them in the corner, you or Mr. Dienstag?

A. He helped to carry them in and I put them in the corner, I think.

Q. Did you ever turn over the jewelry to Mr. Kleinman physically or to Mr. Dienstag physically?

A. No, Mr. Dienstag told me where to put them. He says, "Keep them all together," and I just put them all together that way.

Q. At the time that the pledges were being run off on the adding machine, what was Mr. Kleinman doing, if anything? [289]

(Testimony of Leo Kravitz.)

A. He was outside reading a paper, or sitting at a desk there at the door.

Q. When you say outside, you mean outside the office? A. Outside the office.

Q. Was he walking around at that time?

A. Just as usual, he always walks around, walks up and down always.

Q. When you say "just as usual, walks up and down all the time," would you describe that to the Court.

A. I have known him, have been very close to him for about five or six years, and he always walks and holds his hand on his head and just walks all the time. I was at his home, was at San Francisco, and he does the same thing.

Q. Did you notice whether or not Mr. Kleinman appeared to be nervous on that occasion when the pledges were being set aside for him?

Mr. Wolver: That is objected to as calling for the conclusion of the witness:

The Referee: I think it calls for a conclusion. You can ask this witness to describe what he saw, but whether he was nervous probably is a conclusion.

Mr. Wolver: I think he should be allowed to answer to keep this record down. I don't think it is important. I think I will withdraw the objection.

The Referee: Objection withdrawn. Read the question. [290]

(Question read.)

(Testimony of Leo Kravitz.)

A. Not more than any other time.

Q. By Mr. Chotiner: Did you notice whether or not Mr. Kleinman was excited on that occasion?

A. No sir. [291]

Q. By Mr. Chotiner: Do you remember the occasion when the security was set aside for the Simon people?

A. Very little of it.

Q. Has anything happened since that occasion to diminish your memory of the situation?

Mr. Wolver: That is objected to as calling for the conclusion of the witness, incompetent, irrelevant, and immaterial.

The Referee: Overruled.

The Witness: What was the question?

The Referee: Read it.

(Question read.)

Mr. Dienstag: I submit the question is unintelligible.

The Referee: That is for the witness to say.

Q. By Mr. Chotiner: Do you understand the question? A. No.

Q. I will withdraw it then. Were you present at any time on that occasion when the security was set aside for the Simon account, in which Mr. Kleinman had a conversation with Mr. Sol Zemansky regarding the subject of using some of his security?

A. I think Sol Zemansky told me to take a box of Mr. [292] Kleinman's pledges and give it to Lyman.

(Testimony of Leo Kravitz.)

Q. When Mr. Sol Zemansky told you to do that, what did Mr. Kleinman say, if anything?

Mr. Wolver: That is objected to as assuming a fact not in evidence, that Mr. Kleinman was present. There is no evidence that Mr. Kleinman was present, your Honor.

The Referee: Obviously, he would have to be present if he said anything. It is overruled. The question is, when Sol Zemansky told you to take a box of Kleinman's pledges, what did Mr. Kleinman say, if anything, in your presence?

A. I think Mr. Kleinman says we can make it up and give a fresh bunch of pledges.

Q. By Mr. Chotiner: Did you use some of the boxes of jewelry that had been set aside for Mr. Kleinman, in making up the Simon security?

A. What was that question again?

The Referee: Read it, please.

(Question read.)

A. Yes sir. [293]

By Mr. Chotiner:

Q. What did you do, Mr. Kravitz, when a customer would come in and want to make a redemption of a pledge and that was one of the pledges that had been set aside for Mr. Kleinman?

A. I used to go in the vault and get it and give it to the customer.

Q. What did you do with the money that the customer gave you?

A. I used to put it in the cash box.

(Testimony of Leo Kravitz.)

Q. What did you use the money for after you put it in the cash box? A. Loaned it out.

Q. At that time, did you take another pledge and put it in place of the one that you had taken from Mr. Kleinman's security?

A. The following day or two, or three days later, I would.

Q. But at that same time, did you ever take another pledge and put it in place of the one that you had taken from Mr. Kleinman's security?

A. No sir.

Q. When you put the money in the cash drawer, on one of those redemptions, did you put it in any other section of the cash drawer than the place where you would put any of the money?

A. In the same drawer. [294]

Q. Did Mr. Kleinman ever effect any of those redemptions?

A. What do you mean by that question?

Q. I will withdraw the question. Mr. Kravitz, did Mr. Kleinman ever make a redemption of a pledge that had been set aside to him for security?

A. Yes sir.

Q. What did he do with the money when he received it from a customer?

A. Put it in the drawer.

Q. In the same manner that you had done?

A. Yes sir.

Q. And was that money used over again for the purpose of making new loans to customers?

(Testimony of Leo Kravitz.)

A. Yes sir.

Q. By Mr. Chotiner: Directing your attention to Trustee's Exhibit No. 8, that is a form of pawn ticket that was used at the Provident Loan Association, is that correct? A. Yes sir.

Q. And was that the form that was used after the security had been set aside for Mr. Kleinman?

A. Yes sir. [295]

Q. And is it true that the longer piece was the one that was given to the customer?

A. Yes sir.

Q. Then there were duplicate stubs, is that correct? A. Yes sir.

Q. What was done with one of the stubs?

A. One stub went to Mr. Kleinman and one stub we kept; yes, that is right, one stub went to Mr. Kleinman and another stub book set aside.

Q. When was it that you would give the stub to Mr. Kleinman?

A. Well, we would give it to him in a couple of days later, three or four days later.

Q. Did you give him the stub at the time that you gave the long piece to the customer?

A. No sir.

Q. Then the stubs were kept in a book together, is that correct? A. Yes sir.

Q. And then when more security would be set aside for Mr. Kleinman, every few days, you would pull those stubs from the book and give them to Mr. Kleinman? A. That is correct. [296]

(Testimony of Leo Kravitz.)

Q. By Mr. Chotiner: What would be done with the other stub?

A. The other stub would be filed away.

Q. Was any segregation made of the second stub, insofar as pledges that had been set aside for Mr. Kleinman was concerned?

A. Any segregation?

Q. Of the second stub?

A. Not as I know of.

Q. Now, after the customer had left, you found yourself [297] in the possession of two stubs for each loan, didn't you? A. Yes sir.

Q. Now, tell me where did you put those two stubs?

A. One stub Mr. Kleinman kept when he would get his pledges.

Q. But, until he would get it, where did you put it?

A. We would keep it in the regular book.

Q. In the regular book? A. Yes sir.

Q. Well, you mean a loose leaf book?

A. A loose leaf book.

Q. Did you have any particular name for that book? A. No sir.

Q. What did you men refer to, how did you call it when you talked to one another about that book?

A. We would always know there was nothing else in that book.

Q. Where did you keep that book?

A. Right on the desk.

(Testimony of Leo Kravitz.)

Q. Where did the other stub go; as soon as the customer left, what did you do with that?

A. You mean the other part that Mr. Kleinman would not get?

Q. Yes.

A. I think they used to be kept right around in one of those jewelry drawers. [298]

Q. Did you have those in a loose leaf book?

A. No sir.

Q. You just put those in a drawer?

A. Yes sir.

Q. All right. Now, when it became time then to give Mr. Kleinman security, would you give him all of the stubs that were in that loose leaf book, or just some of them?

A. We would give him, if it was three or four thousand dollars worth of loans, maybe we would pull out 15 or 20 pledges, that would make that amount and try to give him the largest ones.

Q. And the rest you would leave?

A. The rest we would leave.

Q. In the loose leaf book?

A. That is right.

Q. Now, when a customer came in to redeem, tell me what you would do. You would go in the safe and get the jewelry, I know that, but what would you do about the stub?

A. Well, we would look in certain boxes, to see where it belonged. If it belonged in the Simon box, we would look in the Simon box; we would have the

(Testimony of Leo Kravitz.)

number on the outside where we could tell what they were and the initials on the box. If it would be Simon, we would put it in the Simon box; if it would be Kleinman's, we would put it in the Kleinman box, and if it was Bob Gans, we would put it in Bob Gans' drawer. [299]

Q. Were there still others that didn't belong either to Simon, Kleinman or Gans?

A. Yes sir.

Q. That belonged to the company?

A. Yes sir.

Q. Taken out of there? A. Yes sir.

Q. What, if anything, would you do about the stubs that were put in the drawer?

A. They would be kept separately.

Q. When a customer would come in, would you go out and get that stub also out of the drawer?

A. It would be on the shelf there; everything was right out in front.

Q. You would go and get that one too?

A. Yes sir.

Q. Is that right? A. Yes sir.

Q. Then you would have before you the customer's receipt that he would sign before getting his jewelry, and you would have two stubs again?

A. Yes sir.

Q. Wouldn't you? A. Yes sir.

Q. Now, after you were through with the customer that time and he redeemed his pledge, what did you do with the [300] stub?

A. Put it back on the shelf where it belonged.

(Testimony of Leo Kravitz.)

Q. What would you do with the one, for instance, that belonged to Mr. Kleinman?

A. Put that right back too.

Q. In the book again? A. Yes sir.

Q. Did you take it out of the book, make the redemption and then put it back in the book?

A. No, we would leave it in there.

Q. You wouldn't take it out at all?

A. No sir.

Q. You would simply stamp it or mark it "Redeemed"? A. That is right.

Q. Would you put any mark on the one that you put back on the shelf?

A. No sir; we would put a mark on the ticket that had Mr. Kleinman's name; I used to mark that number down.

Q. What do you mean by "the ticket"?

A. This ticket right here.

Q. You mean the customer's ticket?

A. The customer's ticket.

Q. Where would you file the ticket away?

A. Right on the file with the other books.

Q. What do you mean by that; I don't understand.

A. The Gans tickets, the Simon tickets, or our [301] customers' tickets.

Q. You mean you had a spindle?

A. Yes, a spindle.

Q. You just put them on there?

A. Yes sir.

(Testimony of Leo Kravitz.)

Q. Until at some later time they would be taken up and taken care of?

A. The next morning they would be taken care of.

Q. I am still not clear on what you did with the stub that you put on the shelf or in the drawer, whichever it was; when the customer came in to redeem, what would you do about that; did you actually go and take that out; or did you just leave it there?

A. I would have to take it out to compare the signature, the signature of the customer. We would have his signature and he would come in and sign it and we would have to compare the signature, to see whether the jewelry belonged to him or not.

Q. On a pledge that had been given to Mr. Kleinman, wasn't the customer's signature on that stub?

A. Yes sir.

Q. Couldn't you compare it from there?

A. Yes sir.

Q. Why didn't you?

A. I did; I would have to.

Q. Maybe I don't understand you; you started by [302] telling me when a customer came in and got a loan, after he was gone you found yourself with two stubs.

A. Yes sir.

Q. One you put in a loose leaf book.

A. Yes sir.

Q. And the other you put in a drawer or a shelf, you said. What was it, a drawer or shelf or what?

(Testimony of Leo Kravitz.)

A. A little compartment; they are against the wall where all the stubs would fit in.

Q. Were they filed by number, by name or what?

A. Filed by number.

Q. By number. Now, when the time for redemption came, did you actually go and get that stub out of the compartment and also refer to the stub that was in the loose leaf book?

A. No sir; we didn't go to the stub in the book.

Q. The loose leaf? A. In the shelf.

Q. Where did you put the book, was that put on the shelf? A. Yes sir.

Q. Where did the other stub go, that was put on the shelf too? A. No sir.

Q. Where did that go?

A. After we were through with it, we would put it [303] behind the showcases or something.

Q. When were you through with it?

A. After the girl would make out her record.

Q. After the loan was redeemed?

A. After the girl would make out the record of redemption.

The Referee: Perhaps it is not important, but I can't get it straight.

Mr. Chotiner: I think I can clear it up by Mr. Kravitz' brother-in-law.

The Referee: Maybe it is not important.

Mr. Chotiner: It is to a certain extent, your Honor.

(Testimony of Leo Kravitz.)

Q. Mr Kravitz, there were two sets of stubs, is that correct? A. Yes sir.

Q. One set—if counsel will permit me to ask a few leading questions—what was done with the one set of stubs; where did you keep them?

A. One set of stubs Mr. Kleinman would get.

Q. Before Mr. Kleinman got them, where did you keep them?

A. We would keep them in a desk, or lying around on the desk somewhere.

Q. Tell us how you actually handled the pledge books up there; you had a place where you kept those books, didn't you? [304] A. Yes.

Q. Where was it? I will ask it this way. Where did you keep the actual book that contained one set of stubs?

The Referee: Have you got another witness on this point?

Mr. Chotiner: Yes.

Mr. Laugharn: We have another witness, but this man practically ran the business.

The Referee: I don't know whether you are going to get from him any intelligent description of how that thing was handled.

Mr. Chotiner: Maybe the witness can answer the question now.

Q. Where did you keep the book that contained one set of stubs? A. On the desk.

Q. Where was that desk?

A. Right in the office where we kept the money.

(Testimony of Leo Kravitz.)

Q. That is the cashier's portion, is that right?

A. That is right.

Q. When the stubs would be pulled out of that book and given to Mr. Kleinman, where did you keep the Kleinman stubs?

A. In a little compartment.

Q. Where was that compartment?

A. Right in the same little office. [305]

Q. Were the Kleinman book of stubs kept together with the Provident book of stubs?

A. No.

Q. Where were they kept, in the same place?

A. The same place, yes sir.

Q. But in separate books, is that the situation?

A. Yes sir.

Mr. Wolver: That is leading and suggestive.

The Referee: You have got to lead this witness; there is no question about it.

Mr. Wolver: May I be heard on that, your Honor. The witness has testified to one set of facts, then counsel in his question brings in another. He said they were kept in a compartment separate from the others, and now counsel says "in the same place." He has already told us it was in a separate compartment.

The Referee: I am satisfied, gentlemen, that you are not going to get any helpful assistance from this witness on this. He just hasn't got the faculty of explaining things; that's the trouble, he can't picture it.

(Testimony of Leo Kravitz.)

Q. By Mr. Chotiner: Where was the second books of stubs kept?

Mr. Dienstag: I think——

The Referee: Please don't interfere; this is difficult enough.

A. I think the second book of stubs was kept behind [306] the wall case, behind the jewelry.

Q. By Mr. Chotiner: When a redemption was made of a pledge, did you go to the second book of stubs that was kept behind the wall case?

A. No sir, we didn't.

Q. Was any segregation made in the second book of stubs between the Kleinman pledges and those that were not set aside for him?

A. No, there was not.

Q. Mr. Kravitz, was any change made in the form of pledge tickets that were used at the Provident Loan Association at any time during the last two years of the business?

A. This is the change right here.

Q. And when did this one come into being, being Trustee's Exhibit 8?

A. About a year or so.

Q. A year or so from when?

A. I don't remember.

Q. You don't remember the date? A. No.

Q. Did you ever use any other form of ticket in reference to the Kleinman transaction other than Trustee's Exhibit 8? A. Yes sir.

Q. What was the difference between that form and [307] Trustee's Exhibit 8?

(Testimony of Leo Kravitz.)

A. It didn't have a duplicate.

Q. Didn't have a duplicate stub?

A. No sir.

Q. Other than that, were they the same?

A. Yes sir.

Q. Now, on the ones that didn't have the duplicate stubs, what procedure did you follow in reference to the Kleinman pledges?

A. They were put in with the others.

Q. When you say they were put in with the others, to what are you referring?

A. If we would have a redemption, we would have mixed them all together, following the number.

Q. When the pledges were set aside for Mr. Kleinman, and you were not using the duplicate stubs, what did you do with the stub that was contained in the book?

A. You mean the original stub?

Q. Yes. A. They were all put together.

Q. Were they kept in a separate book for Mr. Kleinman? A. Yes sir.

A. And at the time the loan was first made, the stubs were all kept together, is that correct?

A. Yes sir. [308]

Cross Examination

By Mr. Dienstag: [309]

Q. And did you and Mr. Sego ever confer with Mr. Kleinman about the value of jewelry?

A. Yes sir.

(Testimony of Leo Kravitz.)

Q. He was, was he not, sort of a final judge on the subject of values? A. Yes sir.

Q. And if you had any doubts at the Provident about the value of jewelry, you would call in Mr. Kleinman? A. Yes sir.

Q. And that was most of his work that was connected with the loan department, was it not?

A. Yes sir.

Q. That together with the sale of jewelry to the jobbers, that is, brokers, rather, and retail jewelry customers, consisted of the bulk of his duties? A. Yes sir. [310]

Q. He had very little to do with the actual making of pledges, is that correct?

A. Just off and on. [311]

Q. Mr. Kravitz, you were at the Provident as a loan clerk from the time that it was opened at Seventh and Hill, were you not? A. Yes sir.

Q. And it was about at that time, was it not, Mr. Kravitz, that Mr. Zemansky—Mr. Kleinman came to the Zemansky Brothers?

A. Just about that time.

Q. When they opened up their new place at Seventh and [312] Hill? A. Yes sir.

Q. It was approximately in October or November of 1935? A. Yes sir.

Q. During all this period of time, from the end of 1935 until the time that the petition in bankruptcy was filed, there arose occasions, did there not, when there was insufficient money in the cash drawer to make loans? A. Yes sir.

(Testimony of Leo Kravitz.)

Q. And that was all through that period?

A. Well, it wasn't as bad.

Q. Well, there was less money, let us say, later on than there was in the beginning?

A. That is right.

Q. But at all times there were occasions when there was insufficient money in the cash drawer to make loans? A. Yes sir.

Q. On those occasions, you would have to phone Mr. Dave Zemansky, would you not, at 558 South Main Street? A. Yes sir.

Q. And ask him to bring some cash?

A. Yes sir.

Q. If it was not there, you would ask Mr. Kleinman for some cash? A. Yes sir. [313]

Q. On a great many occasions, he let you have that, didn't he? A. Yes sir.

Q. When he let you have that cash, did you give him any receipt for it?

A. I would give him an I. O. U. for it.

Q. Now, I am going to show you—will you look at this, please, Mr. Kravitz, showing the witness a piece of paper with the words “June 8, 1939, I. O. U. \$350, Zemansky Brothers, by Leo Kravitz.” Do you recognize this piece of paper and the words written on it? A. Yes sir.

Q. Whose handwriting is that, Mr. Kravitz?

A. That is all my handwriting.

Q. On that occasion, you gave that, did you not, to Mr. Kleinman to evidence the fact that you had

(Testimony of Leo Kravitz.)

asked him for money and that he had given it to you? A. Yes sir.

Q. This was one of the cases with regard to which you have testified on which Mr. Kleinman loaned money to the Zemanskys? A. Yes.

Q. And that happened from the end of 1935 until the time that the petition was filed, until the place was closed? A. Yes sir. [314]

The Witness: Mr. Kleinman first came there in 1935. I don't think I asked him for any money from the start, maybe a year or so, or six months.

The Referee: After he started?

A. Yes sir.

Q. By Mr. Dienstag: Then I will correct that. From a period about six months after he started. [315]

A. About six months, or a little better.

Q. That would be about the middle of 1936?

A. That is right.

Q. I think you answered yes to my question with regard to whether or not you ever observed Mr. Kleinman as he was selling jewelry to brokers?

A. Yes sir.

Q. Of your own knowledge, do you know whether he sold that in large amounts, that is, large values? A. Large and small.

Q. Well, did he sell many dollars worth, that is, thousands of dollars worth of jewelry in that fashion? A. Yes sir.

(Testimony of Leo Kravitz.)

Q. You were employed by Zemansky Brothers right up to the time that the place was closed by the petition in bankruptcy? A. Yes sir.

Q. And you were thus employed by Zemansky Brothers during the period of February 1st to the end of February, 1939? A. Yes.

Q. Do you recall on occasion during 1939 when Mr. Zemansky asked you to stay after your regular hours on that day and select certain pledges?

A. I do.

Q. On that occasion to which you have testified there [316] were present yourself, Mr. Sego, myself and Mr. Kleinman. Was Mr. Sol Zemansky there for a while that evening?

A. I don't think so.

Q. And you described your procedure in selecting these pledges by stating that you took five or six drawers of the larger sized pledges, meaning, in amount, of course; that is, you didn't mean the jewelry was big, you mean the amount loaned was large? A. The amount loaned was large.

Q. Yes; and those boxes were taken into another office? A. Yes sir.

Q. Now, in that office, Mr. Kravitz, where the jewelry was taken, that was the business office, was it not, of the firm or at least there were adding machines in there? A. Yes sir.

Q. A flat topped desk? A. Yes sir.

Q. Those boxes were put down, were they not, on this desk? A. Yes sir.

(Testimony of Leo Kravitz.)

Q. The procedure you followed was, or that we followed, should I say, that either you, myself or Mr. Sego would write down the numbers of those pledges as you called them off; that is, you would look at the first pledge and then give us the number; is that correct? [317]

A. I think it was the numbers and the amounts, if I am not mistaken.

Q. First you did give the numbers of the pledge on the pledge envelope, and also the amount for which the pledge was pawned? A. I think so.

Q. And those numbers were all written down on sheets of paper at that time, were they not?

A. I know you had some sheets there.

Q. Now, will you look over these sheets and see if you recognize them, just take them up and look over them, and see if you can find any of your own handwriting on them.

A. Right here is my handwriting.

Q. Where?

A. I think this is it right here, this one.

Q. Does the sight of your handwriting on that sheet of paper recall to your mind the fact that on that occasion you wrote down some of the numbers of the pledges and the amounts? A. Yes sir.

Q. As they were called off to you? A. Yes.

Mr. Laugharn: Do you want to introduce them?

Mr. Dienstag: I am going to.

Mr. Laugharn: You are just laying your foundation? [318]

(Testimony of Leo Kravitz.)

Mr. Dienstag: Yes.

Mr. Laugharn: Can we see that?

Mr. Dienstag: Surely.

The Witness: Mine is right there and I think Mr. Sego's is right there.

Q. By Mr. Dienstag: You recognize Mr. Sego's also? A. Yes.

Mr. Laugharn: Is this the work sheet that was made up, and this was transposed——

Mr. Dienstag: In the contract, so by comparing the original contract you will find the pledge numbers are the same.

Mr. Laugharn: This is embodied in the original contract.

Mr. Dienstag: Oh, yes, the numbers are.

Mr. Laugharn: What do you want this for, if you have the original?

Mr. Dienstag: Only to show how this transaction was handled at the office.

Mr. Laugharn: The pledge numbers are the same in there as in the contract.

Mr. Dienstag: You have my assurance they are.

Mr. Chotiner: As long as he has testified to the manner in which it was handled, it is not necessary to encumber the record by having the sheets of paper actually introduced. [319]

The Referee: I don't see how it is going to help us at all. Proceed.

Q. By Mr. Dienstag: Now, Mr. Kravitz, after you had selected these various pledges, they were

(Testimony of Leo Kravitz.)

added up on an adding machine, were they not, at that time? A. Yes sir.

Q. You got the amounts that these items were pledged for? A. Yes sir.

Q. And when we had selected the amount of pledges upon which the loans granted exceeded \$100,000, that was the point at which we stopped selecting pledges? A. Yes sir.

Q. So that the amount of pledges contained in the last box were added up also?

A. What was the last question, please?

Q. When we totaled up, when the amount of pledges was totaled up in the last box, we found that the total amount selected up to that time was now in excess of \$100,000? A. Yes sir.

Q. At that time we stopped selecting any old pledges? A. Yes sir.

Q. Now, there was, was there not, a cardboard, a small white cardboard, placed in the receptacle in the front of those boxes? A. Yes sir. [320]

Q. Marking the number of the pledge at one end of the box and a number at the other end of the box? A. Yes sir.

Q. Then underneath those numbers, or above the numbers, the initial "K"? A. Yes sir.

Q. And the first box was marked "K-1"?

A. Yes sir.

Q. The second box "K-2"?

A. I don't know anything about the 1 or 2, but I know there was a "K".

(Testimony of Leo Kravitz.)

Q. You remember the "K." There was then selected in the vault of the Provident Loan Association a section in which these boxes were placed, one below the other, all in the same section?

A. Yes sir.

Q. And you were instructed at that time, were you not, that that was the position in which those boxes should be kept? A. Yes sir.

Q. And thereafter those boxes were kept in that position? A. Yes sir.

Q. And except for the replacement of new pledges for pledges which had been redeemed, there was no change in the position of the boxes? [321]

A. No sir.

Q. Or in the manner of their keeping?

A. No sir.

Q. In carrying out these duties, you were following the instructions of your employer, Mr. Sol Zemansky, were you not? A. Yes sir.

Q. Now, Mr. Kravitz, do you know who took the pledge tickets, representing these pledges, out of the ordinary pledge boxes of the concern?

A. Abe Zemansky.

Q. Yes, and he started to do that the next morning, did he not, after the pledges had been selected?

A. I think so, yes.

Q. And his duty had been completed in three or four days? A. Yes sir.

Q. And after these pledge tickets were taken out of the general pledge boxes of the company, they were put into separate boxes, weren't they?

(Testimony of Leo Kravitz.)

A. Yes sir.

Q. And they were all bound together in separate loose leaf books? A. Yes sir.

Q. And across the edge of all of these books was put the initial "K"? [322] A. Yes sir.

Q. So that the "K" ran across the edge of the entire group of pledges, which formed a solid background? A. Yes sir.

Q. And all of the pledges so selected, whether at that time or at future times, were kept in separate books? A. Yes sir.

Q. Marked "K"? A. Yes sir.

Q. And they remained there at all times?

A. Yes sir.

Q. Until the day a payment was made?

A. Yes sir.

Mr. Dienstag: Now, I would like to have Exhibit 8. Here it is.

Q. Now, Mr. Kravitz, you have testified that at one time this pawn ticket differed from the one in evidence, in that this extra stub at the end was not attached to the ticket? A. Yes sir.

Q. So that prior to that time, when making a pledge, you would give the customer the large ticket? A. Yes sir.

Q. You would retain the stub in your file?

A. Yes sir.

Q. The customer would sign the stub, is that correct? [323] A. Yes sir.

(Testimony of Leo Kravitz.)

Q. When the customer returned with the large stub, then the customer would sign the large stub in his possession? A. Yes sir.

Q. Upon your comparing the stub which was in your possession, you concluded, as long as he had possession and the signature was the same, the jewelry belonged to him? A. Yes sir.

Q. You would return it to him upon payment of the principal and the interest? A. Yes sir.

Q. This stub then, or these stubs, which corresponded to the pledges which had been selected for the Kleinman group, were taken out of the record book where they were at that time and put in separate books? A. Yes sir.

Q. Those were the ones that had the customer's signature upon them? A. Yes sir.

Q. So when a customer came into the Provident Loan Association, the only way you could find out whether the signature was the same and whether these numbers corresponded, was to go to this stub?

A. Yes sir. [324]

Q. You had no other stub which you could go to?

A. No sir.

Q. Now, this form of ticket, Mr. Kravitz, was not printed, was it, until sometime after the security was given on the Kleinman loan?

A. I really don't know when it was.

Q. You don't remember when this was printed?

A. No, I don't know.

(Testimony of Leo Kravitz.)

Q. So that the only way you could tell is by taking it to the printer, is that it?

A. That is right.

Q. Now, Mr. Kravitz, you have stated that when the loan was redeemed, you would put that particular ticket, the redeemed ticket, upon a spindle?

A. Yes sir.

Q. And by that you mean—I am sorry, your Honor, perhaps I should have kept this a little longer—you would take the original ticket, the large ticket which the customer had, and put it on the spindle? A. Yes sir.

Q. And before you did so, you would mark on this large ticket which the customer had had in his possession, some mark that would identify that as a Kleinman pledge ticket? A. Yes sir.

Q. What did you do at the end of the day with regard [325] to those tickets that were on the spindle?

A. At the end of the day, I would go over every one of the tickets and look for all the Kleinman, Bob Gans and Simon tickets, and just segregate them.

Q. But if there were not any Simon tickets or Gans tickets, you would look for the Kleinman tickets, is that correct? A. Yes sir.

Q. And you would segregate them?

A. Yes sir.

Q. Would you note the numbers of those in any way? A. Yes sir.

(Testimony of Leo Kravitz.)

Q. Where would you put the numbers?

A. I would put them on little tabs, the numbers and the amounts.

Q. What would you do with those tabs?

A. The next morning I would give them to Mr. Kleinman.

Q. When these were made up, you would give them to Mr. Kleinman? A. Yes sir.

Q. So you gave him a record of——

A. What was redeemed.

Q. On the day before? A. Yes.

Q. With regard to the stub in this book, which was redeemed, which remained in the book, what would you do [326] with regard to that?

A. That was left in the book.

Q. Would you mark that in any way?

A. They were marked redeemed.

Q. When you handed to Mr. Kleinman this little tab with the numbers of the pledges which had been redeemed, would you give those numbers to anybody else?

A. No sir, I would give it to Mr. Kleinman; that's as far as it would go.

Q. You didn't give it to your employers?

A. I think Mr. Kleinman would give it to them.

Q. Mr. Kleinman would give it to your employers? A. Yes.

Q. And do you know whether a record was kept of these Kleinman pledge books and any other pledge books in the Provident Loan Association?

(Testimony of Leo Kravitz.)

A. I think Abe Zemansky would take care of that.

Q. Did he have such a record that you know of?

A. I don't know.

Q. Well, do you recall whether there was a book with these numbers in the book, or don't you?

A. I don't know.

Q. When you got the money, or when you got the money when one of these pledges was redeemed, you testified you put that in the cash drawer?

A. Yes sir. [327]

Q. Is that correct? A. Yes sir.

Q. And then you would use that money in taking in other pledges, that is, you would loan it to customers, wouldn't you? A. Yes sir.

Q. You did the same thing with all the money that came in, didn't you? A. Yes sir.

Q. In other words, if money came in from a pledge that belonged to the company, and which had not been assigned to anyone, you would use that money for new pledges, any money that came in would be used for new pledges?

A. Not all the time, no.

Q. Well, what would you use the money for?

A. The remaining money I used to have to lay aside.

Q. But eventually that money was used, was it not? A. Eventually, sometimes.

Q. Now, when you loaned this money out on new pledges, you would not mark the new pledges,

(Testimony of Leo Kravitz.)

the new pledge tickets, would you, in any form other than your usual description of the jewelry and numbers and so forth? A. That is all.

Q. So those new pledge tickets, as they came in, were not marked "Company," or "Simon," or "Kleinman," or "Gans"? A. No sir. [328]

Q. And you would have them in consecutive order, would you not, in all of those books?

A. Yes sir.

Q. So if you were running in the 2300 series, the numbers would be 2301, 2302, and so forth?

A. Whatever the numbers would be.

Q. Now, at frequent intervals every other day or every three days, you were delegated to the duty, weren't you, of selecting additional pledges to replace the pledges which had been redeemed out of the Kleinman boxes? A. Yes sir.

Q. And that was a continuous duty, was it?

A. Yes sir.

Q. Now, who took the pledge tickets out of the new tickets which had come in, and placed them in the Kleinman book? A. Abe Zemansky.

Q. So that was his duty, was it not?

A. Yes sir.

Q. And did you ever see him do it?

A. Yes sir.

Q. And was that just frequently when he picked out the pledges themselves? A. Just about.

Q. So as you picked out the pledges, Mr. Abe Zemansky would pick out the tickets? [329]

(Testimony of Leo Kravitz.)

A. Yes sir.

Q. Now, there was some difficulty, Mr. Kravitz, with regard to the second stub, that is, after this form was completed, when you got through making it out—I assume you had a piece of carbon paper between the first and second stubs?

A. Yes sir.

Q. One of these stubs was put into a book?

A. Yes sir, one of the stubs was put in a book.

Q. The other stub was kept loose and you say you had it in a drawer? A. Yes sir.

Q. and at frequent intervals, isn't it a fact that you would pick up these loose stubs which were left there and make them into a package?

A. Yes sir.

Q. They were not put into a book, or were they?

A. Well, the ones put into a package would be unredeemed; I mean, would be redeemed.

Q. Before we go to the redeemed pledges, Mr. Kravitz, let's bear in mind this extra duplicate which we have never used before, until this form was used; that extra duplicate was kept separate from the others, wasn't it?

A. It has been so long ago I can't just get that straightened out. One of the Zemanskys can straighten it out. It will all come to my mind, but I just can't get it [330] straight.

Mr. Dienstag: I think perhaps I can get the information I want in another way.

Q. You said eventually these extra stubs were kept behind the wall case?

(Testimony of Leo Kravitz.)

A. I am pretty sure they were.

(Discussion between Court and counsel.)

Q. By Mr. Dienstag: By the wall case, you mean the jewelry case where the jewelry was kept?

A. Yes sir.

Q. Let's picture this for the Court. You walked into the Provident Loan Association, directly in front of you as you enter the premises there are a series of jewelry cases, which form an oblong?

A. Yes sir.

Q. On the outside of this oblong is a wooden case running up to a height of approximately two feet and above that a glass case? A. Yes sir.

Q. Within the glass case, which follows the contour of the room, and to form a large oblong, is contained jewelry, or it contains jewelry?

A. Yes sir.

Q. And that jewelry ordinarily was jewelry which was sold at retail? A. Yes sir. [331]

Q. Now, behind these showcases and within this oblong was jewelry which ran to the ceiling and also cases and drawers? And a sitting room?

A. Yes sir.

Q. Now, in this room were kept certain stubs, is that correct, some redeemed stubs; you had no more room for them, so you put them there?

A. Yes sir.

Q. They were not going to be used any more?

A. No sir.

(Testimony of Leo Kravitz.)

Q. Is that what you meant when you said you thought those duplicates were kept in that same place? A. I think so.

Mr. Dienstag: Well, I won't pursue that any further.

Mr. Laugharn: To summarize that——

Mr. Dienstag: I think the witness has summarized it.

Mr. Laugharn: Ordinarily the book with the duplicates had no use whatever in the system; they were just put here some place?

Mr. Dienstag: Frankly, I don't know at this time.

The Referee: Overruled; let's go on.

Mr. Dienstag: May I ask another question?

Q. Was this room being actually used, which had the duplicates, did you ever use this room at all?

A. I don't think so.

Q. As a matter of fact, this room was never actually [332] put in operation at the Provident, was it? A. I don't think so.

Q. I think that you have stated, Mr. Kravitz, when these pledges were originally selected for Mr. Kleinman, I am taking you back to that time, the purpose in pulling out certain of these drawers was because the amounts loaned were large?

A. That is right, yes sir.

Q. Now, Mr. Kravitz, you have been questioned about the Simon transaction, so you know what I am talking about when I say Simon transaction?

(Testimony of Leo Kravitz.)

A. Yes sir.

Q. You were instructed at one time subsequent to the selection of those pledges, were you not, to take certain of the pledges out of the Kleinman drawers and list the numbers? A. Yes sir.

Q. At the same time you were given instructions, were you not to select other pledges for Mr. Kleinman? A. Yes sir.

Q. So that as soon as you selected the pledges and got the numbers out of a particular drawer in the Kleinman box, you started selecting other pledges to replace those? A. Yes sir.

Q. When you had finished selecting those new pledges, you placed those, having obtained the numbers, you placed [333] those in the Kleinman drawer, did you not? A. Yes sir.

Q. Now, if I am not mistaken, Mr. Kravitz, that was done, this selecting was done during the day before the evening that Mr. Ross, the attorney from Judge Pacht's office, and Mr. Simon and Mr. Lyman came over to check their contract numbers as against the pledges which you had selected for them out of the Kleinman box?

A. I don't quite get that.

Q. I will ask it again; it was rather long. The morning of the day on which you were told to select pledges out of the Kleinman drawers for the Simon, having selected those out of the Kleinman drawers, which you did by picking out one drawer, you then began to select new pledges for Mr. Kleinman?

(Testimony of Leo Kravitz.)

Mr. Chotiner: We object to that as assuming facts not in evidence, that he was told on the morning of the day.

Mr. Dienstag: It is cross-examination.

The Referee: Overruled.

A. After the Simon transaction was all over, then I started to collect the pledges for Mr. Kleinman.

Q. By Mr. Dienstag: You mean by the Simon transaction being over, that you had selected the pledges for the Simons?

A. After the Simon transaction was over, then I began to collect pledges for Mr. Kleinman. [334]

Q. You replaced them with the exact amount of other pledges and tickets? A. Yes sir.

Q. And in that case, as in the previous case, Mr. Abe Zemansky pulled those tickets out of the regular books, didn't he? A. Yes sir.

Q. And those were kept separate?

A. Yes sir.

Q. Handled just as the other transaction had been handled? A. Yes sir.

Q. Do you remember at this time whether the amount of pledges selected for Mr. Kleinman to replace those which were taken for the Simons, were equal in number, or greater than the amount which had been taken?

A. Do I remember the amount?

Q. Not the exact amount, but do you recall that the pledges equaled the pledges which had been taken, or more than equaled them?

(Testimony of Leo Kravitz.)

A. I think it was a little better than \$30,000, or around that.

Q. Your recollection is that it was about \$30,000?

A. Or around there. [335]

Mr. Dienstag: If your Honor please, by stipulation the following statement is made, that the total amount for which the articles were pledged, which were selected as security for the February 24th contract, was \$107,140, so that is the security, the principal amount, for which the articles were pledged. This did not include any interest due on the pledges.

Mr. Laugharn: In other words, that is the total of the pledges without interest, as set forth in the Exhibit A attached to the contract of February 24th.

Mr. Dienstag: That is correct.

Q. Now, Mr. Kravitz, subsequent to the time that you selected these original pledges in the sum of about \$107,000, there arose occasions, did there not, when there was insufficient money in the cash drawer in order to make loans? A. Yes sir.

Q. And at those times also, Mr. Kleinman advanced money to you with which to make loans? [336]

A. Yes sir.

Q. Now, do you of your own knowledge, know whether any of those sums were repaid or not?

A. I don't know.

Q. Were there many of such amounts advanced?

A. Off and on, yes sir.

Q. So that the total amount so advanced would be rather substantial, would it not?

(Testimony of Leo Kravitz.)

A. I think they would, yes sir.

Q. I mean, it would amount to several thousand dollars altogether?

A. Every bit of that, yes sir.

Q. By Mr. Dienstag: You have heard of Mr. Gans?

A. Oh, yes, Mr. Gans, yes. [337]

Q. Robert Gans?

A. Yes sir.

Q. Did you take out of the Kleinman pledges, pledges for the Gans transaction?

A. I think I did.

Q. Yes. And you were instructed to do that by your employer, of course?

A. Yes sir.

Q. Yes. At that time, you also selected other pledges, did you not, to replace in Mr. Kleinman's box, the ones which you had taken out for the Gans transaction?

A. Yes sir.

Q. And those were all selected, that is, the replacement pledges were selected about that time, as you remember?

A. Yes sir.

Q. And those tickets were taken out of the pledge books by whom, Mr. Kravitz?

A. Mr. Abe Zemansky.

Q. So all through this period, Mr. Kravitz, you were the one who actually handled the pledges themselves, that is, the physical pledges so involved, you were the one who carried forth the transaction with regard to taking them out of the boxes or replacing them with others?

A. Yes sir.

Q. And Mr. Abe Zemansky, one of your employers, was the one who took these pledge tickets out of the books, and [338] did he put them in the

(Testimony of Leo Kravitz.)

other Kleinman books himself or did you put them in? A. No, he put them in.

Q. He put them in there. And that is where you found them, didn't you? A. Yes sir.

Q. So after you had selected new pledges to replace pledges which you picked out in these two transactions, the Simon and the Gans transactions, you found the tickets for those pledges which you had selected to be put in the Kleinman box in the Kleinman books? A. Yes sir.

Q. That is where you compared the signatures?

A. Yes sir.

Q. And that is the way you did it until the time that the place was closed? A. Yes sir. [339]

Q. Well, after you selected the Gans pledges,—(withdraw that) After you had selected the pledges for Mr. Kleinman's box to replace the Gans pledges, did you put those into a cardboard box at first?
[340]

A. I don't think so.

Q. You don't think so. Well, what did you do with them, do you remember?

A. I don't remember.

Q. So at this time you don't recall just how you did this? A. No, I don't.

Q. In other words, you might have done it one way or the other? A. That is right.

Q. With this reservation, that you have testified that about the time you selected the pledges out of the Kleinman box, you also selected new pledges to replace them? A. Yes sir. [341]

(Testimony of Leo Kravitz.)

Q. Mr. Kravitz, earlier today in your examination, or cross-examination, you stated that you had put these redeemed tickets, the large portion of the pledge that the customer had, on a spindle, and that at the end of the day you would copy the numbers down, which referred to the Kleinman pledges, which were redeemed, and then you would hand that slip to Mr. Kleinman.

A. Yes sir.

Q. Now, will you look at this piece of paper, dated February 21, 1939, that has numbers and figures opposite those numbers; is that your handwriting?

A. Not that one, the date is.

Q. The date is your handwriting?

A. Yes.

Q. And this one dated February 22nd?

A. Yes sir. [342]

Q. Is that all your handwriting?

A. All in my handwriting.

Q. And the one dated February 23rd?

A. That is in my handwriting.

Q. February 24th.

A. All my handwriting.

Q. February 25th.

A. All my handwriting.

Q. February 27th.

A. Not mine.

Q. February 28th.

A. Not mine.

Q. February 29th.

A. That is not mine.

Q. Or, rather, March 1st, as there was no February 29th. How about this one?

A. No.

(Testimony of Leo Kravitz.)

Q. Will you look through these as I put them down and select any that is yours?

A. Yes sir.

Q. This is dated March 7th?

A. That is mine.

Q. These are the tickets then to which you have reference, is that correct?

A. Yes sir.

Q. Let us take this one, for example, dated February [343] 22nd. On that date, you made a note on this slip of paper, "February 22, 1939, No. 43175, \$70"; that is correct? A. Yes sir.

Q. And that was the redemption on that date?

A. Yes sir.

Q. That was the only redemption?

A. The only one I made.

Q. Then you gave that ticket to Mr. Kleinman, as a record of the pledge which had been redeemed and the amount of the pledge?

A. Yes sir.

Q. And this was, of course, the procedure that you followed every day from the day that you had selected the pledges until the time that the Provident Loan Association was closed?

A. Yes sir.

Mr. Chotiner: We would like to have that marked for identification, that one and the rest of them also.

Mr. Dienstag: All right. I will take these pledge tickets which I have referred to, being six in number, and dated February 21st, February 22nd, Feb-

(Testimony of Leo Kravitz.)

ruary 23rd, February 24th, February 25th, and that isolated one here of March 7th, and offer them for identification as Kleinman's Exhibit A.

The Referee: That will be Kleinman's Exhibit A for Identification. [344]

Mr. Dienstag: If there is no objection, your Honor, I will offer these in evidence rather than for identification.

The Referee: Is there objection?

Mr. Chotiner: At least, as to February 21st, the witness said it was not in his handwriting.

The Referee: All right ask the witness again whether all of these are in his handwriting.

The Witness: All of these here are in my handwriting.

The Referee: The ones you are holding in your hand are in your handwriting. Very well.

The Witness: The date on this one is in my handwriting. (Referring to the slip dated February 21st.)

Mr. Chotiner: But the rest is not in your handwriting.

The Witness: No.

Q. (By Mr. Dienstag): Do you know whose handwriting that is?

A. It looks like Abe Zemansky's.

Q. You are familiar with Abe Zemansky's handwriting? A. Yes sir.

Q. Abe Zemansky was one of your employers?

A. Yes sir.

(Testimony of Leo Kravitz.)

Mr. Dienstag: We offer them all at this time.

The Referee: Is there objection? All right; they will be Kleinman's Exhibit 3 in evidence.

KLEINMAN'S EXHIBIT No. 3

Feb. 21, '39

33401.....	75.00✓
35771.....	75.00✓
45148.....	85.00✓
45884.....	50.00✓
47381.....	175.00✓
47415.....	50.00

Feb. 22, '39

43175.....	✓\$ 70.00
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Feb. 23, 1939

42763.....	50.00✓
46130.....	100.00✓
46129.....	50.00✓
40830.....	80.00✓
39059.....	200.00✓
44208.....	150.00✓
44204.....	200.00✓
	(S45029✓)
45775.....	100.00✓

Feb. 24, 1939

46722.....	✓ 150.00
40404.....	✓ 80.00
40071.....	✓ 50.00
47508.....	✓ 70.00
25201.....	✓ 50.00
41233.....	✓ 50.00
39945.....	✓ 150.00
42690.....	✓ 100.00
29925.....	✓ 150.00

(Testimony of Leo Kravitz.)

Feb. 25, '39

3733*..... X 175.00✓

[*Illegible; defaced in original exhibit.]

40541.....✓ 160.00

41154.....✓ 50.00

42055.....✓ 50.00

44298.....✓ 85.00

46099.....✓ 50.00

46852.....✓ 150.00

March 7, 1939

45199.....✓O 200.00

48000.....✓N 30.00

42387.....✓O 75.00

48078.....✓N 40.00

47894.....✓O 50.00

[Endorsed]: Filed Aug. 23, 1940.

Mr. Dienstag: Your witness, counsel [345]

The Referee: Do you want these?

Mr. Chotiner: If I may, your Honor.

Redirect Examination

By Mr. Chotiner:

Q. Directing your attention to Kleinman's Exhibit No. 3, the one dated February 21, 1939, when you put that date on there, was the writing that appears above the date already on the slip of paper?

A. Yes sir.

Q. Do you have an independent recollection of that piece of paper?

(Testimony of Leo Kravitz.)

A. No, I haven't.

Q. On what do you base it, that you put the date on there after the other writing was already on the piece of paper?

A. Well, I wouldn't put it on there here, down here; if I was to do any writing, I would put the date here, up here.

Q. Do you know why the date had not been put on there at the time the slip was given to you?

A. I probably told Mr. Abe Zemansky to give me a record of all numbers. I probably got busy and he took a record of the numbers and I put the date on it. That happened that way.

Q. Can you tell us what the insignia means on this [346] slip of paper, dated February 21, 1939, after the \$75?

A. That means they were checked off of Kleinman's books.

Q. Where you find one where that same insignia does not appear, what does that indicate?

A. I guess that must have been something to look up on Kleinman's books, we left it open.

Q. Wherever the insignia indicated by an X with the line joining the two diagonal lines on the left-hand side appears, does that mean that that is one that was checked against the Kleinman books?

A. Yes sir.

Q. February 22nd was Washington's birthday; was the Provident Loan Association open that day for business?

(Testimony of Leo Kravitz.)

A. I am pretty sure it was.

The Referee: February 22, 1939, was on a Wednesday.

A. We were open on that day.

Q. (By Mr. Chotiner): Now, whenever you would make a redemption of a pledge that had been set aside for Mr. Kleinman, was there another pledge of approximately the same amount in the vault that had not been set aside for any other creditor? A. There were.

Q. Now, whenever you would make a redemption of a pledge that had been set aside for the Simons, what did you do with the money? [347]

Mr. Wolver: That is objected to as being incompetent, irrelevant, and immaterial, not binding on this claimant whatsoever.

Mr. Chotiner: They went into it on cross-examination.

The Referee: Overruled.

A. We put it in Mr. Simon's box.

Q. (By Mr. Chotiner): Was that money put in the regular cash drawer from which you made loans? A. No sir.

Q. Now, directing your attention to Trustee's Exhibit 8, which is the form of pledge ticket, I believe you testified to on cross-examination, that that form was not used at the Provident; did you mean the entire form was not used or a portion of it was not used?

A. A portion of it was not used.

(Testimony of Leo Kravitz.)

Q. And which portion were you referring to when you so testified on cross-examination.

A. The duplicate.

Q. The duplicate stub, is that correct?

A. Yes sir.

Q. Now, at the time you set aside security for the Simon account,— Withdraw that. I will now direct your attention to the time when you set aside the security for the Simon account, that was the occasion when you took some of the Kleinman pledges, and used them to make up the Simon security; is that correct? [348]

A. Yes sir.

Q. How long after you did that was it that you set aside additional pledges for the Kleinman account to make up the pledges that had been taken from him?

A. As soon as I finished the Simon transaction.

Q. How long after was that?

A. It might have been that same day.

Q. Do you remember whether it was in the daytime or in the nighttime that you set aside the security for the Simon account?

A. We finished up the next day. At night we started and finished up the next morning.

Q. That finished up the Simon?

A. The Simon account, the next morning.

Q. How long after that was it then that you put back or, rather, put the security on Kleinman's side in the vault after you finished the Simon matter?

A. That same day.

(Testimony of Leo Kravitz.)

Q. Do you have an independent recollection of doing that? A. Yes sir.

Q. Just as soon as you finished Simon, did you start immediately then to set aside some pledges for Kleinman?

A. I am positive it was.

Q. Then why did you take some from Kleinman's pledges to give to Simon in the first instance? [349]

A. Well, for the Simon account, we gave them old pledges, which would not be redeemed so fast; the money would not come in so fast with the Simon account. They were old pledges.

Q. In other words, you took old pledges from the Kleinman security to give to Mr. Simon; is that correct? A. Yes sir.

Q. Was that the only reason that you know of as to why that was done?

A. The only reason, yes sir.

Q. Were there any other reasons?

A. It was easier to come through with the transaction with the Simon.

Q. Well, Mr. Kravitz, will you explain to us then what was easier about taking drawers of pledges that had been set aside for Kleinman instead of going to another portion of the vault and taking pledges that had not been set aside for anyone?

A. It would take us four or five hours.

Q. They were all in the same place, weren't they? A. No sir.

(Testimony of Leo Kravitz.)

Q. You only had one vault, isn't that correct?

A. Yes sir, but I had to go through maybe 25 or 30 drawers to get large loans out of there.

Q. Where were the large loans?

A. Segregated all over the vault. [350]

The Referee: I think I would like to ask the witness what his understanding of the term "large loan" is.

A. Anything from \$50 up.

Q. (By Mr. Chotiner): Directing your attention to the time when the Gans security was set aside, how long after that was it that you replaced security that had been taken from the Kleinman drawers?

A. As soon as we finished up the transaction.

Q. Mr. Kravitz, do you have an independent recollection of those occasions?

Mr. Dienstag: I don't understand this "independent recollection," after every statement the witness makes. He said that he did it at that time.

The Referee: It is overruled. Proceed.

A. The only thing I know, as soon as I finished Mr. Gans' transaction, I started on Mr. Kleinman's transaction.

Q. (By Mr. Chotiner): At the time you set aside pledges for Mr. Gans, were there other pledges in the vault which had not been set aside for any creditor? A. No sir.

Q. You mean then that at the time the Gans pledges were set aside for him, there were no

(Testimony of Leo Kravitz.)

pledges in the vault that had not been assigned to anybody else? [351]

A. Just Kleinman and Simon.

Q. Then where did you get the pledges to replace the ones from the Kleinman account that you had set aside for Gans?

A. There were a lot of \$20 loans, \$15 loans, \$10 loans, and \$25 loans, that we didn't want to put in the Gans transaction.

Q. Then there were other pledges in the vault at that time that had not been assigned to any other creditor; is that correct? A. Yes sir.

Q. Well, were all of the pledges at the time of the Gans transaction— Withdraw that. At the time you set aside the security for the Gans account, were all of the pledges in the vault set aside for some creditor with the exception of the small ones, of about \$10 or \$15?

A. I don't quite understand that.

Q. I will try to do a little better. At the time you set aside the security for the Gans account, were all of the pledges that were in the vault at the Provident Loan Association already set aside for some other creditor with the exception of small loans? A. No sir.

Q. Then there were some large loans in the vault at that time that had not been set aside for other creditors; is that correct? [352]

A. No, there were a lot of small loans that were not set aside for creditors.

(Testimony of Leo Kravitz.)

Q. In other words, there were a lot of small loans in the vault that had not been set aside for other creditors, is that correct?

A. That is right.

Q. Now, during the times that you would talk with Mr. Kleinman at the Provident, did you ever talk to him about the Tango business in which the Zemanskys were interested?

A. Off and on, yes sir.

Q. What was it that you used to say to Mr. Kleinman and Mr. Kleinman used to say to you about the Tango business?

A. Used to talk to him about El Cerritos, if they ever got going, they would make a lot of money there.

Q. What did Mr. Kleinman say about it?

A. "I am glad to hear it."

Q. Was anything else said by you or Mr. Kleinman about the Tango business operating?

A. He knew it was a very good business when they got going. [353]

At the time you selected the Gans pledges the pledges to replace the Gans pledges, taken out of Mr. Kleinman's box, there were about 20 or 30 drawers of pledges that were assigned to no one, weren't there? A. Yes sir.

Q. You had already been through a good many of those boxes to get large loans?

A. Yes sir.

(Testimony of Leo Kravitz.)

Q. Especially when you picked up \$100,000 or more for the Kleinman transaction?

A. Yes sir.

Q. Now, in these 25 or 30 boxes full of pledges, there might have been a large loan here and there, is that correct? A. That is right.

Q. But in order to select those, you would have had to go through 25 or 30 boxes, wouldn't you?

A. Yes sir. [354]

Q. And there are a lot of those pledges in one box, aren't there?

A. Yes sir.

Q. Possible a couple hundred in a box?

A. 200 or more.

Q. 200 or more. Is that the reason why you first picked the numbers out for Gans, then went through a box to replace them for Kleinman?

A. Yes sir. [355]

Q. And the Tango business was mentioned?

A. Tango.

Q. Or the other amusement enterprises of the Zemansky Brothers. It was well known that they were in the amusement business, was it not?

A. Yes sir.

Q. Especially among the employees?

A. Yes sir.

Q. And was the general opinion which was expressed to you by the other employees and yourself to them that that was a very profitable business when it was running? A. Yes sir.

(Testimony of Leo Kravitz.)

Q. So that the discussions which you had with Sam Kleinman in regard to that were the same that you had with the other employees? A. Yes.

Redirect Examination

By Mr. Chotiner: [356]

Q. Directing your attention to the first time that you set aside pledges for Mr. Kleinman, and then you would go ahead and make redemptions for customers, how often would it be that you would accumulate other pledges and put them over into the Kleinman security account?

A. Well, I used to have them ready for Mr. Kleinman, if I got a bunch of them set aside, they would amount to three or four thousand dollars; I would give them to Mr. Abe Zemansky and Abe Zemansky brought them to me and we would give them to Sam, three or four thousand dollars worth of pledges.

Q. That would happen to be every two, three or four days?

A. A little longer than that sometimes. [357]

ROBERT SEGO

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chotiner:

Q. Were you an employee of the Zemansky Brothers? A. I was.

Q. And how long were you employed by them?

A. Well, I say around 32 years.

Q. And that was right up to the bitter end, is that right? A. That is right.

Q. By that, I mean up to the time that they filed bankruptcy proceedings?

A. That is right.

Q. During that period of time, and particularly directing your attention to the last few years what were your duties?

A. As a loan clerk and salesman.

Q. And where did you work in the last few years?

A. The last year and a half I worked at the Provident Loan Association.

Q. Your duties as loan clerk, I assume, were to make loans to customers when they would come in?

A. That is correct. [358]

Q. Did you ever handle any redemption of loans? A. I did.

Q. Now, then, did you have access to the vault?

A. I did.

(Testimony of Robert Sego.)

Q. Did you ever open up the vault in the morning?

A. I did a few times, not very many times.

Q. Who used to open up the vault?

A. Mr. Kravitz.

Q. Mr. Kravitz is your brother-in-law?

A. That is correct.

Q. Directing your attention to the time when the security was set aside for Mr. Kleinman, do you remember that occasion generally?

A. I do.

Q. At that time, whenever you would make a redemption of a pledge that had been set aside for Mr. Kleinman, what did you do with the money?

A. Put it in the cash drawer.

Q. And what did you do with the money after it went in the cash drawer?

A. Used it for loans again, when they came in.

Q. Did you set aside that money in a separate place in the cash drawer from money from other pledges?

A. No sir.

Q. Was that the same place in which you put the money that you received from redemptions on other loans? [359]

A. That is right.

Q. Did you ever see Mr. Kleinman— Withdraw that. Did Mr. Kleinman ever make redemptions of pledges that had been set aside for him?

A. He did.

Q. What did he do with that money?

(Testimony of Robert Sego.)

A. He put it in the cash drawer, too.

Q. Was that money used again for the purpose of making new loans?

A. That is right.

Q. Who would go into the vault to get a pledge, where it was a pledge that had been set aside for Mr. Kleinman?

A. Well, anybody that would be waiting on the customer at the time.

Q. In other words, any loan clerk who was waiting on a customer would go to the drawer and take the pledge?

A. That is right.

Q. Did you ever see Mr. Kleinman look in the cash drawer?

A. I did.

Q. And what would be the occasion of his looking in the cash drawer?

A. Oh, he looked in the cash drawer many times. If he would look in and didn't find any money, he dropped his hands where the money was supposed to be and just say, "Nicht gut." [360]

Q. What does "Nicht gut" mean?

A. No good.

Q. Did he used to do that before the security had been set aside for him?

A. Well, any time that there wasn't very much money in there.

Q. Were those occasions before the time the security was set aside for him?

A. Before and after.

(Testimony of Robert Sego.)

Q. Did you ever have any conversation with Mr. Kleinman or talk with him about there not being money in the cash drawer?

A. There were occasions, a few occasions.

Q. On the occasions that he did talk to you, however, what did he say, if anything.

A. Well, he would say, "How long is this going to keep on?"

Q. What did you say, if anything?

A. I said, "I don't know."

Q. What did he say, if anything, after that?

A. He didn't say very much. He would walk away, put his hand behind his back, or behind his ear, and scratch the back of his head.

Q. During what period of time was it when you were up at the Provident that there appeared to be a lack of cash on more occasions than previously? [361]

A. During what period of time? Let's see. I won't say exactly, but the time when I went up there, there appeared to be plenty of money. Later on, it seemed like it dropped to where there wasn't much money.

Q. When it started to drop down to the point where there wasn't much money, did you ever have an occasion when a customer would come in to borrow money, and you wouldn't have sufficient money to make the loan?

A. Yes, but I made the loan. I would inquire to see if I could get the money, either through Leo or Dave Zemansky.

(Testimony of Robert Sego.)

Q. Who did you ask for the money?

A. I asked Leo whether he could get it, or Dave Zemansky at the 558 store.

Q. Were there occasions after speaking to Leo Kravitz or calling Dave Zemansky, that you still did not get sufficient money to make a loan?

A. There would be.

Q. Was that on very many occasions?

A. Toward the last, yes sir.

Q. Did that occur prior to the time that security was set aside for Mr. Kleinman?

A. It was a few times, not very often. [362]

Cross Examination

By Mr. Dienstag:

Q. I am quite interested in this habit of Mr. Kleinman's of putting his hand on the back of his head. Did you say he rubbed or scratched?

* * * * *

Q. During all that period, let us say, when he started doing business with the Zemanskys in 1935, I presume you are referring to, when he came to the Provident Loan Association? [363]

A. No, when he came to the Main Street Store, 517.

Q. You had known him over there?

A. Yes sir.

Q. At that time, did he have this same habit of rubbing the back of his head with his hand and walking up and down?

(Testimony of Robert Sego.)

A. Well, not in the store at that time, because he never came in with his hat off.

Q. Where was it you first noticed this habit?

A. I noticed it at the Provident.

Q. At the Provident? A. Yes.

Q. When you first went there?

A. Yes.

Q. He was accustomed to doing that. You worked there about a year and a half?

A. Maybe a little bit longer, but approximately.

Q. In any event, a year and a half before the time the Provident closed up, there was Mr. Kleinman rubbing the back of his head and walking up and down?

A. Walking up and down, or walking in a circle.

Q. Oh, he was walking in a circle, too?

A. Yes.

Q. At that time, when you first went there, Mr. Sego, and he was walking up and down or in a circle, and rubbing the back of his head, there was plenty of money [364] in the cash drawer?

A. When I first came up there?

Q. Yes. A. Yes.

Q. That is what you just said. There was plenty of money in the cash drawer, there was Mr. Kleinman walking up and down all around, and rubbing the back of his head. The answer was yes?

A. Yes. [365]

(Testimony of Robert Sego.)

Redirect Examination

By Mr. Chotiner: [366]

Q. Did you notice whether there was any change in his manner after he got the security?

A. After he got the security?

Q. Yes.

A. Well, I don't know whether there was much change in him, Mr. Chotiner.

Q. Was there a change that was noticeable to you in any way?

A. Well, he might have been a little more calm, but that's all. [367]

DAVE ZEMANSKY,

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

The Referee: Your name is Mr. Dave Zemansky?

The Witness: David Zemansky.

Direct Examination

By Mr. Chotiner: [368]

Q. Now, bearing in mind the amount of interest that you paid during the year, are you able to tell us approximately what the total amount of principal there was owing by Zemansky Brothers?

(Testimony of Dave Zemansky.)

A. I never did run it off. During every month there was some money coming in and some money to go. Sometimes we paid, sometimes we received money.

Q. Within a couple hundred thousand dollars, can you tell us approximately how much the firm owed? A. No.

Mr. Chotiner: Q. You saw the schedules that were filed by you and your brothers in the bankruptcy proceedings, didn't you?

A. Yes sir.

Q. And at the time you saw those schedules, you signed them, isn't that correct?

A. Yes sir.

Q. And at that time you found out, or at least you [370] knew, that Zemansky Brothers owed approximately over one million dollars, isn't that right?

A. Yes sir, at that time.

Q. Was there any substantial change in the amount of money that was owing by Zemansky Brothers within a period of one year prior to the time you filed the petition?

A. I wouldn't say any large amount.

Q. It didn't vary, in any event, more than \$200,000, did it?

Mr. Dienstag: Objected to as leading.

The Referee: Sustained.

Mr. Chotiner: Q. How much did it vary during that year, do you know?

(Testimony of Dave Zemansky.)

A. I couldn't say for sure.

Q. Can you give us an estimate of how much it varied? A. I don't know, no.

Q. Well, did it vary more than \$200,000?

Mr. Wolver: That is objected to as calling for the conclusion of the witness.

The Referee: Overruled. The witness apparently knows but is not answering. Perhaps some question will refresh his recollection. Overruled.

A. Did you say \$200,000, I don't know for sure, but I would presume it would not be that much.

Mr. Chotiner: Q. Did you see the schedule of the assets of the Zemansky Brothers at the time the petition [371] was filed?

A. Yes sir.

Q. And they were true and correct?

A. No. At the time the petition was filed?

Q. At the time the schedules were filed?

A. They had taken stock and one thing and another.

Q. They were true and correct to the best of your knowledge? A. Yes sir.

Q. You signed that schedule, isn't that true? Did you sign that schedule of assets?

A. No, I don't remember whether I did or not. I don't believe I did.

Q. At any rate, you saw the schedule?

A. The Receiver took charge of the stock and everything else, all there was.

(Testimony of Dave Zemansky.)

Q. Mr. Zemansky, in this proceeding, did you ever see the schedule of assets that was owned by Zemansky Brothers?

A. Yes, sir, later on, in the inventory.

Q. Was there any substantial difference between the total of those assets at the time you saw them and within a year's time prior to that?

A. As I say, I don't think there could be very much difference in the last year.

Q. When you say there couldn't have been much difference in the last year, could it have depreciated more [372] than a couple of hundred thousand dollars?

Mr. Miller: That is objected to as leading.

The Referee: Overruled.

A. Not more than that.

Mr. Chotiner: Q. Not more than that. At the time the petition was filed under Chapter 11 of the Bankruptcy Act, did your assets consist of more than fifty per cent of your liabilities?

A. I wouldn't know. [373]

Q. Now, directing your attention to the contract dated February 24, 1939, which covers a series of \$5,000 notes, totaling \$100,000, do you recall the circumstances under which you signed that contract; that is, do you remember [376] where it was?

A. Yes sir.

Q. Where did you sign it?

A. At the Provident Loan Association, 706 South Hill Street.

(Testimony of Dave Zemansky.)

Q. When was that?

A. That, as I understand it, the date would be around——

Mr. Wolver: Just a moment.

The Referee: Give us your best recollection.

A. It was the night Mr. Dienstag was in town. He had to go back to San Francisco and they wanted me up at the Provident that night. There were some things I remember. Mr. Kleinman was there the same night.

Q. What happened at the Provident Loan Association, if anything, the night you signed the contract?

A. Well, there was Mr. Kleinman and Mr. Dienstag in the front room and myself, then in the next room I think were William Simon and Mike Lyman and a representative from Isaak Pacht's office, and they also had the pledges on a desk in that same room; they were trying to work out the Simons' deal in regard to the pledges.

Q. Was it on the night that the Simons people were up at the Provident Loan Association and the security was being set aside for them, that you signed the February 24th contract?

A. Yes sir. [377]

Q. When did Abe Zemansky sign that contract, if you know?

A. That same night.

Q. Was the signature of Mr. Kleinman on the contract before you and your brother signed it?

(Testimony of Dave Zemansky.)

A. Now, that I don't remember.

Q. Are you able to tell us one way or the other as to whether his signature was on there?

A. I couldn't say. My brother Abe pointed out in the contract where it says in case anything should happen to Abe Zemansky, his insurance money should go to Mr. Kleinman, and he asked me about it. I said I guess there is not much to be done about it.

Q. Was Mr. Kleinman demanding that something be done about it?

A. He said he would have to be protected for his money. [378]

Q. Were you present at the time Mr. Kleinman volunteered to take a reduction in salary?

A. No, I wasn't there, but I might explain I used to send the checks to Mr. Kleinman at the Provident. I used to [379] send a check to the Provident for \$75, and Mr. Kleinman would not take the checks; so that might account for some of those I.O.U.'s; if you notice, there were several I.O.U.'s, one for \$75, \$50. I think later on I used to make out the checks for \$50. I happen to know more about the checks, because I sent them to the Provident, but he would not take the \$75 checks.

Q. Do you know why it was that Mr. Kleinman would not take the \$75 checks?

Mr. Dienstag: That calls for a conclusion and opinion of this witness.

The Referee: Sustained.

(Testimony of Dave Zemansky.)

Mr. Chotiner: Q. Did Mr. Kleinman give any reason why he would not take the \$75?

A. He told me there wasn't enough business up there. [380]

Cross Examination

By Mr. Dienstag: [381]

Q. All of the principal books of your business were kept at 558 South Main Street?

A. That is right.

Q. Mr. Zemansky, all of this time that you were signing the checks, did you know how much money you owed, that is, that the business owed?

A. No sir.

Q. You had no idea? A. No sir.

Q. Did you know how much money you had out on pledges? A. No sir.

Q. So you don't know how many pledges you had in the vault drawing interest?

A. No sir.

Q. Except from the fact that you took in certain sums every day? [382]

A. We didn't give it much thought. If we got any new money or not, we were always in position to pay. That's the way we went along.

Q. So all of this time that you were writing these checks, you didn't know how much you had owed, and you also didn't know how many pledges you had in the vault that people were paying you interest on? A. That is right.

(Testimony of Dave Zemansky.)

Q. Your rate of interest during most of that period, Mr. Zemansky, that is, the rate that you charged on these loans, was three per cent, was it not? A. Yes sir, and it was two.

Q. When referring to those figures, we are speaking of the rate of interest per month, is that correct? A. Yes sir.

Q. You say it was two per cent?

A. Yes sir.

Q. About how long back, Mr. Zemansky?

A. I think previous to 1934, and then the rate was changed to three.

Q. Then you charged three per cent?

A. Yes.

Q. So from 1934 on, you increased the rate of interest which you were charging to make loans and your income increased correspondingly, isn't that correct? A. Yes sir. [383]

Q. So that theoretically, as I see it, Mr. Zemansky, as people paid the amounts due, you were getting thirty-six per cent a year on your money that was outstanding? A. Yes sir.

Q. In other words, on all pledges that came in after 1934 you charged three per cent?

A. Yes sir.

Q. So that on all money that you had out, represented by loans on pledges that were in your vault, you would be getting thirty-six per cent per year? A. Yes sir.

(Testimony of Dave Zemansky.)

Q. That is the same period of time in which you have stated you had been paying out checks for interest at the rate of twelve per cent?

A. When you say thirty-six per cent, it was thirty-six per cent on loans up to \$300, then the rate was two per cent over \$300.

Q. On all of the money that was out represented by pledges in your vault, you were getting thirty-six per cent per year on loans up to \$300 and two per cent over \$300?

A. Yes sir.

Q. And what was the greater portion of your money loaned out, that is, in what amount did it go out; was the greater amount of pledges under \$300 or over?

A. Over \$300.

Q. Most of them were over \$300, the loans that you [384] made?

A. Yes sir; that is, in volume of money.

Q. That is what I am getting at.

A. In loans, there would be more small loans than larger loans.

Q. You, of course, are familiar with the Pawnbroker's Act, as it affected your business?

A. Yes sir.

Q. And it is a fact, is it not, that you knew after you held pledges for a certain length of time, twelve months, in this particular interest business, you could sell those pledges?

A. Yes sir.

Q. And I believe the practice of your firm was, was it not, to hold them about thirteen months?

A. Sometimes we held them much longer than

(Testimony of Dave Zemansky.)

that. Twelve months was the law.

Q. You notified them, let us say, at the end of thirteen months?

A. Fourteen, two months over the law. The law said twelve.

Q. In other words, you gave the customers extra time? A. Yes sir.

Q. Now, Mr. Zemansky, you didn't loan the full value of the property, did you, to people?

A. No sir. [385]

Q. You attempted, at least, did you not, to loan less money than the pledge was worth, so that when a pledge was left with you, there would be an increase, there would be the difference in the amount which you loaned and the amount that it was worth? A. Yes sir.

Q. It was worth more than you loaned?

A. Yes.

Q. So that if it became necessary to sell that pledge, it would bring in more money than the amount that you loaned? A. Yes sir.

Q. In that way, if interest had not been paid, you received your interest by means of the value of the particular piece of property?

A. Yes sir.

Q. Are you what we might call a diamond expert? A. I was not an expert.

Q. It was not your duty then to make appraisals? A. No sir.

Q. Did you ever act as a loan clerk?

(Testimony of Dave Zemansky.)

A. Yes sir.

Q. So at least you had enough knowledge to see that you would not loan too much on property?

A. Yes sir.

Q. Would you say now, in your opinion as a loan clerk [386] and such degree of expert opinion that you may have, as a rule you got more money for the pledge than the amount you loaned on it?

A. We did in the last few years.

Q. In the last few years you did. Let us take this transaction with Mr. Kleinman, where he sold unredeemed pledges; would you say that more money was obtained from unredeemed pledges than the amount that was loaned on them?

A. Only when the loans were made since 1934 and 1935, and even back to 1932. It was less previous to that. We had loaned very liberally to people. Some people paid interest to us and we held the pledges and we also had cases where they paid a few months' interest, and there were cases where we loaned actually more than we received and lost some money; so we lost money on those loans that were made previous to 1929, before the depression.

Q. But those made from 1930 or 1932 on, you did make money on?

A. Yes, because in 1929, when the depression started to hit us, all pawnbrokers cut down on their loans.

Q. So when it came time to sell those pledges, they were sold at a profit?

A. Yes sir.

(Testimony of Dave Zemansky.)

Q. Did you at any time before you were shown a schedule, after a stock was taken of your property on hand by the Trustee, then the Receiver, did you at any time before that [387] time know how much merchandise you had on hand which was not redeemable merchandise, just jewelry?

A. No sir.

Q. So that until the figures were shown to you and an appraisal taken, you did not know how much salable merchandise you had on hand?

A. No sir.

Q. Now, at the Provident Loan Association, Mr. Zemansky, there are a series of show-cases, or were at that time rather, a series of show cases, I believe they are still there.

A. They are still there.

Q. And in those show-cases were kept jewelry of various kinds and types? A. Yes sir.

Q. Some pieces of jewelry were extremely valuable? A. Yes sir.

Q. Platinum watches with diamonds, large bracelets and so forth?

A. All kinds of jewelry.

Q. Those were the property of Zemansky Brothers? A. Yes sir.

Q. And in the same fashion was jewelry at 558 South Main Street? A. Yes sir.

Q. And perhaps some of the jewelry was not all disposed [388] of, some of it was in the vault?

A. Yes sir.

(Testimony of Dave Zemansky.)

Q. Possibly a good portion of that was kept in the Main Street vault? A. Yes sir.

Q. Was it your practice to keep that kind of jewelry at the Provident office only or principally on Main Street?

A. At the Main Street store we used to clean up the jewelry and take it up to the Provident and display it in the show-cases you mentioned.

Q. Those items of jewelry that were not displayed were kept at the Main Street branch?

A. Yes sir. There was some in the vault at both stores.

Q. You did have some in the vault at the Provident? A. At the Provident, too.

Q. Would you say there was more in the vault at Main Street than there was at the Provident?

A. No. I will tell you what accounts for that. We used to take certain things from the Provident to the Main Street store; we had a register and marked them in that way. That's the way they got down to that particular store.

Q. Regardless of the way they got there, they were there? A. Yes. [389]

Q. And of course, the 558 South Main Street we have been talking about, was a loan office?

A. Yes sir.

Q. At that place you loaned the money just as you did at the Provident? A. Yes sir.

(Discussion between Court and counsel.)

(Testimony of Dave Zemansky.)

Q. (By Mr. Dienstag): Mr. Zemansky, was Mr. Kleinman ever at the 558 South Main Street store, if you know?

A. Oh, yes sir, he came in at different times.

Q. Had he ever been in the vault of the 558 Main Street store? A. Yes sir.

Q. Do you know of your own knowledge, Mr. Zemansky, that Mr. Kleinman had given money to Zemansky Brothers on I.O.U.'s from time to time?

A. Yes sir.

Q. Mr. Zemansky, did you expect to pay interest on those I.O.U.'s?

A. Yes; I offered to pay interest to him and he wouldn't take it.

Q. On how many occasions would you offer it to him?

A. At different times; in fact, some of those notes I think originally started with I.O.U.'s, if I remember right. Those I.O.U.'s kept bobbing up and I wanted to pay him some interest, and Mr. Kleinman would say "Never mind [390] about the interest, make out a new note for the whole amount," which I did, and then we started figuring interest on the new note. Previous to that, we never did, although I offered to pay him interest and he said he didn't want any interest on the I.O.U.'s; make out a new note. A lot of the I.O.U.'s I paid back altogether.

Q. You paid up a group of I.O.U.'s?

A. Yes sir.

(Testimony of Dave Zemansky.)

Q. In cash? A. Yes sir.

Q. At the time you paid the cash, did you pay any interest?

A. I offered to pay it. He said "Don't insult me," or some words to that effect. He didn't take it anyway.

Q. Those would be frequent occasions?

A. Yes sir. [391]

Redirect Examination

By Mr. Chotiner:

Q. Mr. Zemansky, directing your attention to the time of February 24, 1939, the contract covering the \$100,000 worth of notes. From that time on, did you ever pay any principal to Mr. Kleinman on any part of that \$100,000 obligation?

A. No sir.

Q. Now, you testified on cross examination that you were making payments as they arose; were you making them in 1938?

Mr. Miller: That is objected to as indefinite.

Q. (By Mr. Chotiner): Were you making all of your interest payments in the entire year 1938?

A. No sir, come to think about it.

Q. What was the reason you were not making all of your [393] interest payments?

A. I'll tell you; there was my sister and my brother-in-law. I used to make out the checks to my sister, Mrs. Harris, and I mailed out the other checks to the other people when we had the money to spare.

(Testimony of Dave Zemansky.)

Q. Then, did you have sufficient money during the entire year of 1938 with which to make all of your interest payments?

A. Yes sir. I would ask my sister to hold the check and I would phone my sister when I had the money to spare. She never said anything about it and I just let it go at that.

Q. During the last few months of 1938, had there been any checks issued on account of the obligations of Zemansky Brothers, which were returned by the bank because of insufficient funds?

A. 1938? I don't remember.

Q. Were there any in the first part of 1939?

A. There were some checks in 1939 I gave to people and told them to hold them for a day or two before putting them in. That might have been the latter part of 1938.

The Referee: When did you first do that other than with your relatives; when did you first ask anyone other than your close relatives to hold the checks?

A. I think it was the latter part of 1938. I was thinking it was 1939, but I think it was the latter part of 1938 that I made checks to people with the understanding [394] that they were going to hold them and I would let them know when to put the checks in.

The Referee: Proceed.

Mr. Chotiner: That is all.

The Referee: Anything further?

Mr. Dienstag: Yes.

(Testimony of Dave Zemansky.)

Recross Examination

By Mr. Dienstag:

Q. During this period you did send Mr. Kleinman his checks? A. Yes sir.

Q. You didn't ask him to hold his checks?

A. Yes, I asked him to hold the check a day or two.

The Referee: When was that?

A. That was in 1939.

Q. When in 1939?

A. That would be around I think in March. In fact, it was after the new contract.

Q. (By Mr. Dienstag): Mr. Zemansky, directing your attention back to 1932 and 1933 and thereabouts, did you ever have checks come back that you sent out? A. No sir.

Q. Never any shortage of cash at any time?

A. No sir.

Q. Were you borrowing money from people at that time, [395] new money? A. Yes sir.

Q. You were always borrowing money in your business?

A. Always borrowing money. That's why I guess we had no checks come back in this business because we were able to meet them all the time.

Q. In other words, at that time you were borrowing money from a good many people, and you could always get about as much money as you wanted and you were always paying interest?

A. Yes sir.

Mr. Dienstag: That is all. [396]

ABRAHAM ZEMANSKY,

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

The Referee: Your name is Abe Zemansky?

The Witness: Yes sir.

The Referee: Proceed.

Direct Examination

By Mr. Chotiner: [397]

Q. Prior to the time that security was given to Mr. Kleinman, who had access to the vault and the vault door where the pledges were kept?

A. One of our diamond experts by the name of Perry Cussick.

Q. Did you have access to the vault and the vault door? A. Yes sir.

Q. And did you have the combination to the vault? A. Yes sir.

Q. Did any of the other employees have the combination to the vault?

A. Only Perry and Sego, and Leo Kravitz.

Q. After the security had been given to Mr. Kleinman, was the combination on the vault changed? A. No sir.

Q. And did the same people still have access to the vault and the vault door? A. Yes sir.

Q. After the security had been set aside for Mr. [399] Kleinman and a customer would come in and wish to make redemption, how would that be handled?

(Testimony of Abraham Zemansky.)

A. We would go to the safe just as we did before and get the loan out.

Q. Was there any difference in procedure in any way after Mr. Kleinman obtained the security than there was before? A. No sir.

Q. What did you do with the money that you received from the customer?

A. Put it in the cash drawer.

Q. And would that money be used again?

A. Yes sir.

Q. Did Mr. Kleinman ever make redemption of pledges that had been set aside for him?

A. Yes sir.

Q. Did he follow the same procedure that you have just described? A. Yes sir.

Q. Now, Mr. Zemansky, were any notices ever sent to any customers of the Provident telling them that there had been an assignment of security given to Mr. Kleinman? A. No sir.

Q. And were collections handled in the same way that they were before the security had been given to Mr. Kleinman?

A. The same way. [400]

Q. When was it that you signed the contract for the \$100,000 worth of notes?

A. I believe it was on the 27th of February.

Q. Did anything occur on that day that fixes that as being the time in your mind?

A. Why, we were straightening out the attachment on the place. We were straightening out with Simon for the loan, for the money we owed him.

(Testimony of Abraham Zemansky.)

Q. And was that in the daytime or night time that you signed the contract?

A. In the night time.

Q. Did you sign the contract the same time your brother Dave did? A. Yes sir.

Q. Do you know whether the signature of Mr. Kleinman was on the contract at the time you signed it?

A. I don't know; I don't think so.

Q. Was Mr. Kleinman there that night?

A. Yes sir.

Q. Do you know whether he signed the contract that night?

A. Well, that I couldn't swear to. I'll tell you what happened. I started to read the contract over and there was something about the insurance and I wanted to leave it go to the next day and get it to my attorney to read over. He said everything had to be completed that night. [401]

Q. Who told you that?

A. Mr. Kleinman.

Mr. Chotiner: Q. Mr. Zemansky, whenever you made a redemption of a pledge that had been set aside for Mr. Kleinman, how long would it be in the custom of the business before other pledges were used to replace the ones that had been taken away?

A. Sometimes two or three days, sometimes a week. We always ran it to about three or four thousand dollars, fifteen hundred dollars, all over a thousand dollars.

(Testimony of Abraham Zemansky.)

Q. Were there any times when you and Mr. Kleinman talked about not having sufficient money on hand to make loans?

A. Not that I know of.

Q. What was that?

A. I don't know anything about it.

Q. Did Mr. Kleinman ever say anything to you about there not being enough money in the cash drawer to make loans?

A. I don't know about that, any time at all.

Q. Mr. Zemansky, after the contract covering the \$100,000 in notes was signed, did you ever go to the Union Bank with Mr. Kleinman?

A. Yes sir. [402]

Q. What was the occasion of your going to the Union Bank with Mr. Kleinman?

A. Mr. Kleinman would make out a check for the amount of the redemption, say the redemption was \$4,000, and a check was made in his daughter's name.

Q. Do you know what his daughter's name is?

A. Dienstag.

Q. Then after the check would be made out, what would you do?

A. I would go with Mr. Kleinman to the Union Bank. The first time he told the teller any time I brought any check in to cash it. Whatever the amount was the teller would give me the money. Mr. Kleinman would be in the back and take the money, just a routine like that.

(Testimony of Abraham Zemansky.)

Q. After you got the money from the teller, what did you do with it?

A. Mr. Kleinman would be there and I would pass it to Mr. Kleinman.

Q. Did Mr. Kleinman go with you on every occasion that you went to the Union Bank to cash a check?

A. I think most every occasion, maybe once or twice he didn't go.

Q. How close did Mr. Kleinman stand to you at the time you would go down to the Bank and get the money?

A. After the first time it was always at the Union Bank. [403]

Q. And then you would go over to him, is that correct?

A. And hand him the money.

Q. Whose suggestion was it, if you know, to go down to the Union Bank and cash the check and then give the money to Mr. Kleinman?

A. It was his son-in-law's suggestion that that's the way it would be carried out.

Q. Who told you that?

A. Mr. Kleinman.

Q. What did Mr. Kleinman tell you about that?

A. Just said that's the way it had to be carried out. In fact, I don't remember any other words mentioned about it.

Q. Now, whenever you would go down with Mr. Kleinman with those checks to the Union Bank,

(Testimony of Abraham Zemansky.)

did that ever have anything to do, if you know, with the making out of new notes and new contracts?

A. We took the check to the Bank, we got out a new contract and a new note and we put pledges in the drawer for the amount of the loans taken out.

Q. And was that done on all the occasions that these new contracts and new notes were executed?

A. On all of these occasions.

Q. Now, after you gave the money to Mr. Kleinman that you received as a result of cashing the check, do you know what Mr. Kleinman did with the money?

A. Mr. Kleinman re-deposited the money in the same [404] account, because the teller at the Bank the third time I was there wanted to know what was the system of taking the money out one day and putting it back the next day.

Mr. Wolver: I move that the latter part go out, about what the teller said.

The Referee: In the presence of Mr. Kleinman?

Mr. Chotiner: Q. Was it in the presence of Mr. Kleinman? A. He said it to me.

The Referee: Did he say it in the presence of Mr. Kleinman?

A. No sir.

The Referee: It may go out.

(Testimony of Abraham Zemansky.)

Mr. Chotiner: Q. Without telling me what the teller told you or what the teller asked you, about cashing the checks, just answer yes or no, did you tell Mr. Kleinman what the teller told you?

A. Yes sir.

Q. What did you tell Mr. Kleinman?

A. I told Mr. Kleinman that the teller wanted to know what the system was of taking the money out one day and putting it back the next day.

Q. What did Mr. Kleinman say to you, if anything, about that?

A. A few days after that he said that from now on we will make out the checks, he told me this is the way to do [405] it, from now on, instead of \$4,000, make out a check for \$1600, and then the next time make one out for the difference.

Q. Did Mr. Kleinman tell you anything at all as to what to tell the teller?

A. He said to tell the teller that it was his own money in the Bank and it was no business of the teller to inquire from me what was the system of putting the money back again.

Q. Now, Mr. Zemansky, will you explain once more what the difference was, as that is not quite clear in my mind, in the system that was followed in making and cashing the checks after you told Mr. Kleinman what the teller had told you?

A. We would make out one check for a smaller amount, and then when it equaled \$5,000, to put it on account of the note; he would make out another check for the balance of it.

(Testimony of Abraham Zemansky.)

Mr. Horn: May I have that last answer read?

(Answer read).

Mr. Chotiner: Q. What would be the basis for determining as to the amount you would make the check out for in the first place?

A. The amount of loans that was redeemed and new loans placed in the box. [406]

Cross Examination

By Mr. Dienstag: [407]

Q. Mr. Zemansky, you have testified here with regard to some provisions for insurance in this contract. Is it your impression at this time that this contract provided for your insurance as security?

A. No, in case anything happens to me, the insurance goes as security. That is what I understood that night.

Q. Who did you ask about it?

A. I didn't ask anyone. I asked Mr. Kleinman to leave it go to the next day and he said "Everything has to be completed that night." [409]

Q. Did you state at that time that you wanted to know whether your home or your insurance would be liable under this contract?

A. Just the insurance we were talking about, I think.

Q. At that time you asked if anything happened to you, whether the insurance from your estate, whatever it was, would become subject to this liability of this contract?

(Testimony of Abraham Zemansky.)

A. That's the idea. [410]

Mr. Dienstag: Q. You had something in mind, Mr. Zemansky, when you changed the note and contract which appears opposite the contract starting with May 9th to cash on July 5th?

A. I have no idea what it is. It says "Contract cash, \$2400," which is another one I had no dealings with.

Q. You wrote that, didn't you?

A. I wrote that down, but on Mr. Kleinman's orders to write it down.

Q. Who put "cash" there?

A. That was Mr. Kleinman's order. [414]

(Testimony of Abraham Zemansky.)

KLEINMAN'S EXHIBIT No. 5
 PLEDGES REDEEMED AND PAID TO "S. KLEINMAN"
 SAM KLEINMAN, LOS ANGELES, CAL.

Date	Items	Folio	Debits	Date	Items	Folio	Credits
Mar. 2	Returned 5 Notes 5000 E....		25,000	1939 Feb. 24	Contract A		99,379.00
" 2	Credit on 5000 Note.....		920	" 24	" " Cash		621.00
" 22	" " " ".....		2,510	Mar. 2	" B		25,920.00
" 28	" " " ".....		1,570	" 22	" C		2,510.00
" 28	Credit on 5000 Note.....		430	" 28	" D		2,000.00
" 30	" " " ".....		2,200	" 31	" E		2,200.00
Apr. 4	" " " ".....		2,000	Apr. 5	" E		2,000.00
" 4	" " " ".....		370	" 3	" F		2,500.00
" 4	" " 5000 " ".....		2,130	" 8	" G		2,000.00
" 8	" " " ".....		2,000	" 11	" H		2,200.00
" 11	" " " ".....		870	" 13	" I		2,100.00
" 11	" " 5000 " ".....		1,330	" 15	" J		2,200.00
" 13	" " " ".....		2,100	" 18	" K		2,500.00
" 15	" " " ".....		1,570	" 21	"		2,000.00
" 15	" " 5000 " ".....		630	" 24	"		1,500.00
" 18	" " " ".....		2,500	" 28	"		2,500.00
" 21	" " " ".....		1,870	May 2	"		1,200.00

(Testimony of Abraham Zemansky.)

Kleinman's Exhibit No. 5—(Continued)

Pledges Redeemed and Paid to "S. Kleinman"—(Continued)

Date	Items	Folio	Debits	Date	Items	Folio	Credits
1939							
Apr. 21	" " 5000	"	130				
" 24	" " "	"	1,500				
Amt. Frd.							
Apr. 28	Credit on 5000 Note		2,500.00	May 9	Contract		3,700.00
May 9	" " "		870	" 13	"		2,000.00
" 9	Credit on 5000 Note		2,830	" 21	"		3,400.00
" 13	" " "		1,000	June 2	"		3,750.00
" 25	" " "		1,170	June 7	"		3,400.00
" 25	Credit on 5000 Note		2,230.00	" 23	"		3,900.00
June 7	" " "		2,770	" 28	"		4,600.00
June 7	Credit on 5000 Note		630	July 5	" Cash		2,400.00
" 23	" " "		3,900.00				
" 28	" " "		470.00				
" 28	Credit on 5000 Note		4,130.00	A.Z.			

[Endorsed]: Filed Aug. 23, 1940.

(Testimony of Abraham Zemansky.)

Mr. Dienstag: Q. Mr. Zemansky, I call your attention to the left-hand column of the first page of Kleinman's Exhibit 5, and ask you what the sums are which are listed there?

A. These were checks given and they equal \$5,000 for each note.

Q. In other words, these are the credits on each note, Mr. Zemansky, due Zemansky Brothers on notes for which they [415] had signed?

A. Yes sir.

Q. So you would credit yourself with the amount of pledges, is that correct, on the contract made or the payment made, and you would endorse the note a certain amount paid?

A. Mr. Kleinman would put down on the notes "Paid on account," until each note equaled the \$5,000, and then turned the notes over to Dave.

Q. Turned the notes over to your brother Dave?

A. Yes.

Q. In return, you would sign another note?

A. A new note.

Q. For the amount of the new contract?

A. The new contract, that's correct.

Q. If you will follow these dates with me, Mr. Zemansky, March 2nd, referring again to Kleinman's Exhibit number 5, you credited the sum of \$25,920? A. Yes sir.

Q. Now, that was the amount of the Simon transaction, was it not?

A. I believe it was.

(Testimony of Abraham Zemansky.)

Q. In other words, when you signed the Simon contract, that is, the Kleinman contract which had to do with the Simon deal, the Simon transaction, you signed new notes in the sum of \$25,920, and that was credited against the [416] \$100,000 contract? A. That is right.

Q. And following that, when you signed the contract of March 22nd you credited your account with \$2,510, and that was credited on one of the \$5,000 notes and a new note in the sum of \$2,510 was given, the contract was signed and both were delivered to Mr. Kleinman, together with a list of the pledges, thereto attached?

A. That is right.

Q. And you followed the same procedure thereafter with every transaction, isn't that so?

A. Yes sir.

Q. That was the procedure by which you credited the new contracts on the old ones; by the old contracts, I mean the first contracts, Mr. Zemansky?

A. Mr. Kleinman credited the \$5,000, then we made out new notes for the new loans that went in the box.

Q. Now, on May 13th, (?), as indicated by Exhibit 5, Kleinman's Exhibit 5, in the right-hand column after the word "contract," there is the sum of \$3,750 (?)? A. Yes.

Q. You will note, Mr. Zemansky, by looking at the left-hand column an amount which you credited yourself with, and that amount is not included.

(Testimony of Abraham Zemansky.)

Mr. Laugharn: Is that a question?

The Referee: The record speaks for itself. You don't [417] need to ask the witness to interpret the record. It has an exhibit number and it speaks for itself.

Mr. Dienstag: Q. What credit then did you give yourself on that date, Mr. Zemansky, for that \$3,750?

A. This contract, I don't know what credit we got for that. I don't know myself what credit we got.

Q. On the \$3,750 contract, which you signed, and the note which you signed, you did sign a contract and notes, I take it?

A. I guess we did. I must have signed it, it is there.

Q. You don't know what the consideration was?

A. I don't know. I think it can be traced to the book we kept on each pledge, a little blotter.

Mr. Dienstag: If I may have the Claimant's Exhibit number 3, your Honor?

Q. Mr. Zemansky, I call your attention to Claimant's Exhibit number 3, one of the slips comprising that exhibit. I direct your attention to the slip of that exhibit, dated February 21, 1939, to the figures above that date; do you recognize that handwriting? A. That is my handwriting.

Q. That is your handwriting? A. Yes.

Q. Do you know whether you wrote that on February 21st?

(Testimony of Abraham Zemansky.)

A. I don't know whether I wrote it on February 21st, but the top handwriting is all mine. But this is not mine, [418] these dates signed here.

Q. At about that time, that is, about February 20th, 21st or 22nd, were you preparing these slips for Mr. Kleinman, any of them?

A. Well, once in a while I would prepare the slips. Mr. Leo Kravitz prepared most of the slips.

Q. Do you know the purpose of these slips?

A. These were I think the loans supposed to be redeemed on that date.

Q. Which loans, Mr. Zemansky?

A. The loans taken out of the Kleinman pledges, set aside for Mr. Kleinman.

Q. That is, pledges taken out of the Kleinman box on February 21st?

A. The loans that were redeemed.

Q. Do you know why these tickets were being given to Mr. Kleinman, why they were being made out?

A. To show the pledges which were redeemed.

Q. When you made these notations, at the time you made them, you knew they had something to do with the contract which you had entered into with Mr. Kleinman?

Mr. Chotiner: That assumes a state of facts not in evidence.

Mr. Dienstag: If you know?

The Referee: Overruled.

(Testimony of Abraham Zemansky.)

A. Whenever we got a certain amount of pledges that [419] were redeemed, we replaced others for them.

Mr. Dienstag: Q. Before you entered into the contract with Mr. Kleinman, Mr. Zemansky, did you furnish Mr. Kleinman with any slips like these each day?

A. Before we entered into the contract?

Q. Yes.

A. Not before February 27. [420]

Mr. Dienstag: Q. Do you know what this book is, Mr. Zemansky?

A. A register we kept for the pledges we had in Mr. Kleinman's drawer.

Q. This contained all of the numbers of the pledges which went to secure Mr. Kleinman's contract, is that correct; these are the numbers that appeared in Mr. Kleinman's contract?

A. Yes sir.

The Referee: Do you offer that?

Mr. Dienstag: Yes, your Honor.

The Referee: This is Kleinman's Exhibit number 6.

Mr. Dienstag: Q. Who stamped these, did you?

A. No sir.

Q. Who stamped them?

A. One of the girls in the office. [421]

Q. Now, Mr. Zemansky, when a pledge was redeemed, it was stamped redeemed on the date it was redeemed, is that correct? A. Yes sir.

(Testimony of Abraham Zemansky.)

Q. I direct your attention to page 15.

Mr. Laugharn: If the Court please, we are not sure about that book, who kept it and where it came from.

The Referee: It has been received in evidence. Proceed.

Mr. Dienstag: Q. I direct your attention, Mr. Zemansky, to page 15 of this exhibit, which is Claimant's Exhibit number 6, pledge number 29925, marked redeemed February 24, 1939?

A. Yes sir.

Q. I also direct your attention to the slip dated February 24, 1939, in Claimant's Exhibit number 3, which has the number 29925 on it, \$150, corresponding to the number in the book.

A. Yes sir.

Q. Would you say that that pledge was redeemed on February 24th?

A. By looking in the day book and looking on that date, I would say the pledge was redeemed on that date.

Q. Wasn't this book kept for that purpose?

A. No, this was a register kept for Mr. Kleinman.

Q. Did you keep more than one book like this one?

A. We kept I think another book. [422]

Q. With the same numbers?

A. The same numbers.

Q. And it was marked exactly the same way?

(Testimony of Abraham Zemansky.)

A. Just the adding machine tape with the numbers alongside of them.

Q. The same numbers? A. Yes.

Q. In other words, the other was the adding machine tape with these figures opposite giving the same numbers of the pledges?

A. I guess so; it was the same number; it would be the same number.

Q. One was a copy of the other so far as the numbers and the amounts were concerned, is that right? A. That is right.

Q. When you got a pledge in, Mr. Zemansky, did you ever mark these? A. This book?

Q. Yes. A. This book here, no.

Q. Did you ever write in this book yourself?

A. I don't think so; I don't see any of my writing in there.

Q. Suppose you just glance through it quickly.

A. I don't think there is any of my writing in there.

Q. Did you keep the other book with the adding machine [423] tape?

The Referee: I am sorry, Mr. Dienstag, the Court will not permit you to interrogate this witness about the other book unless the book is here.

Mr. Dienstag: I am going to ask that the attorney for the Trustee make it available, because I gave it to the Trustee for their convenience.

The Referee: Very well.

Mr. Weller: What book is it?

(Testimony of Abraham Zemansky.)

Mr. Dienstag: I gave it to the Trustee to help him in the tracing of these amounts and pledge numbers.

Mr. Laugharn: Maybe we can find that one for you, where this one came from.

The Referee: This book is in evidence. Proceed.

Mr. Dienstag: I won't pursue that any further. Later on, when this witness has left we can look through the book for those numbers of February 21st. The witness had some doubt about the date of this slip.

The Referee: All right, proceed.

Mr. Dienstag: I offer this as Claimant's exhibit next in order.

Mr. Chotiner: Objected to on the ground that there has been no showing as to materiality.

The Referee: Overruled. Kleinman's Exhibit 7.

KLEINMAN'S EXHIBIT No. 7

INVENTORY

March 20/39

C1 K

48503.....	200.
48505.....	100.
48513.....	75.
48518.....	100.
48530.....	60.
48537.....	300.
48538.....	90.

(Testimony of Abraham Zemansky.)

48540.....	300.
48542.....	75.
48547.....	100.
48563.....	50.
48567.....	50.
48569.....	100.
48597.....	60.
48603.....	150.
48608.....	150.
48626.....	100.
48637.....	65.
48638.....	60.
48645.....	225.
48651.....	100.
	<hr/>
	2510.

[Endorsed]: Filed Aug. 23, 1940.

Mr. Chotiner: May we have some kind of term applied to it so we will know what it is? [424]

The Referee: This is an inventory or, rather, a list of pledges dated March 20, 1939, totaling \$2,510.

Mr. Dienstag: Prepared by the witness, your Honor.

The Referee: That may be in the record, but I am just telling you what this sheet is.

Mr. Dienstag: Q. Calling your attention to the last exhibit, which is one I believe that you prepared, purporting to be certain pledges which were

(Testimony of Abraham Zemansky.)

security for a contract, did you prepare other lists like that for your contract? A. Yes sir.

Q. Calling your attention to Exhibit number 5, I call your attention to a contract in a column on the first page of the exhibits, and marked March 22, "C," \$2,510. March 22nd I take it is the date you entered into that contract, is that correct?

A. Yes sir.

Q. And "C" is the identification of that particular contract on that date? A. Yes sir.

Q. And the \$2,510 is the amount of the contract?

A. The amount of the contract.

Q. I call your attention to Exhibit number 7, labeled "C," where the security is listed at \$2,510. Now, this security, Mr. Zemansky, is the security for the contract of March 22nd in the sum of \$2,510, is it not? [425] A. That is right.

Q. And those pledges were selected two days before you entered into that contract, is that correct? A. Yes.

Mr. Chotiner: Objected to as calling for the conclusion of the witness.

The Referee: Overruled. It may stand.

The Witness: I couldn't swear to that.

The Referee: There is no question pending.

Mr. Chotiner: I don't think there was an answer.

The Referee: He didn't answer it?

Mr. Chotiner: No.

(Testimony of Abraham Zemansky.)

The Referee: Read it.

(Question read).

A. Yes sir.

Mr. Dienstag: Calling your attention again to Exhibit number 7, after you prepared these lists, Mr. Zemansky, what would you do with those?

A. We would put it in the blotter and give one set to Mr. Kleinman; the other set was put on the blotter and kept as a record.

Q. So that you gave one of those to Mr. Kleinman when you prepared it? A. Yes sir. [426]

Q. I direct your attention, Mr. Zemansky, from the files of the court, to-wit, the proof of claim of Sam Kleinman, therein containing that agreement dated the 24th day of February, and I direct your attention especially to the last page of that agreement, upon which appears the heading "Receipt." This is dated the 24th day of February, 1939. Now, Mr. Zemansky, do you have any recollection at this time of signing that receipt on the 24th day of February, 1939?

A. I didn't sign that receipt on the 24th day of February, 1939.

Q. When did you sign it?

A. The 27th of February.

Q. Are you certain of that?

A. I signed it on the night that Lyman and the Simon boys were in the Provident and you were there also. It was the 27th; it wasn't the 24th.

Q. You are certain it was not the 24th?

(Testimony of Abraham Zemansky.)

A. Absolutely.

Q. And who was present when you—will you read this document first?

The Referee: Mr. Dienstag, you are going to have to move a bit faster. You are not getting anywhere with your case. You are going over and over again the same thing. The witness has stated positively that he signed it on the 27th. Now, proceed. If you have any evidence to the [427] contrary you will have an opportunity to offer it.

Mr. Dienstag: Q. Mr. Zemansky, you have testified on direct examination with regard to the exchange of checks, or, rather, the deposit of a check by you which was made by Mr. Kleinman and deposited by you, that is, cashed by you at the Bank and returned to Mr. Kleinman. Who first suggested that as the transaction?

A. I don't know. The only thing, Mr. Kleinman said it was his son-in-law's instructions and that is how it had to be carried out.

Q. Did your bookkeeper keep a record of the amount of jewelry sold by Mr. Kleinman?

A. It was kept at the 558 store, the amount of jewelry sold by Mr. Kleinman.

Q. And if you know, was a record of such amount of sales given to Mr. Kleinman by your bookkeeper? [428]

A. Mr. Kleinman kept the sales himself, a copy.

Mr. Dienstag: Q. Where did he keep this, if you know?

(Testimony of Abraham Zemansky.)

A. He had a regular memorandum book.

Q. Those were the sales slips themselves, weren't they? A. Yes sir.

Q. You would total the amount of sales for a period of three or four months?

A. He would take them from his memorandum book, he could tell from that.

Q. Tell me this, if you know, of your own knowledge, did the bookkeeper at the 558 store, where those records were kept, furnish Mr. Kleinman with a statement as to the amount of jewelry which he sold? A. That I don't know.

Q. Mr. Zemansky, wasn't it at your suggestion that these check transactions take place?

A. No sir.

Q. Didn't you suggest to Mr. Kleinman that that would be a good way to keep a record of the amount? A. No sir.

Q. Now, Mr. Zemansky, when you picked out the pledges that were to secure these contracts as you entered into them, where were they taken from?

A. I didn't pick the pledges. Mr. Kravitz picked the [429] pledges.

Q. You didn't have anything to do with them?

A. I didn't have anything to do with the picking of the pledges.

Q. Where were the tickets taken from; you took the pawn-tickets themselves, didn't you, out of the books?

(Testimony of Abraham Zemansky.)

A. We made a record of the pledges that Mr. Kravitz picked, and then I took the stubs out of the regular books and put them in the book we kept for Mr. Kleinman.

Q. Now, with regard to the physical taking of these pledge tickets out of the book where they were, and before they were put into Mr. Kleinman's book, where were these pledge tickets taken from?

A. From the office where we kept all the loan tickets, the pledge tickets.

Q. With regard to the point of time, were they taken from the new pledges that were coming in?

A. Not all the time; they were taken from old pledges sometimes.

Q. Sometimes you took them solely from old pledges, did you? A. Yes sir.

Q. And on other occasions you would take them from the pledges which were then coming in from day to day, the new pledges? A. Yes. [430]

Q. So that some contracts are composed of solely new pledges and some of the old?

A. The late contracts are the new pledges. Most of the contracts were for the old pledges. [431]

Redirect Examination

By Mr. Chotiner:

Q. Directing your attention to Kleinman's Exhibit 6, being a ledger book, does that book generally cover all pledges other than the Kleinman pledges?

(Testimony of Abraham Zemansky.)

A. This contains, I believe, only Kleinman pledges. [432]

By Mr. Laugharn:

Q. What were your assets at the time of your bankruptcy, at the time of these bankruptcy proceedings, Mr. Zemansky?

A. What do you mean, personally?

Q. Yes, what property did you have?

A. There was \$68,000 worth of life insurance, some [434] property in Sacramento and out of San Francisco, in San Mateo County, land in San Mateo County.

Mr. Dienstag: Pardon me; I didn't get the answer.

(Answer read).

Mr. Dienstag: Before there is another question, we haven't examined these records at all. They have been introduced by reference, the personal schedules, simply for the purpose of the record. We will object to their introduction into evidence until we can examine them and have some look at what these assets are.

The Referee: Well, if there is objection, you will have to prove the record.

Mr. Laugharn: My questions are not leading to that now.

The Referee: Let us send for them right now.

Mr. Laugharn: I think we can clear it up with a question.

(Testimony of Abraham Zemansky.)

Q. This \$68,000 worth of insurance, that was the face amount of the policy, was it not?

A. Yes sir.

Q. You claimed certain policies were exempt and the Trustee said they were not?

A. Yes sir.

Q. Then you came to a settlement, as evidenced by an order in the file? A. Yes sir. [435]

Q. And you received an exemption on the policies by releasing to the Trustee of the estate a certain amount of money? A. Yes sir.

Q. How much was that that was released to the estate?

A. I think it was around close to \$12,000.

Q. That came into the estate? A. Yes sir.

Q. You had for some time the cash surrender value of your policy, for a year or more?

A. For over ten years; I had policies thirty-five years.

Q. Now, these other properties that you have mentioned, what in your opinion is the value of your equity in those assets?

A. About \$1500.

Q. About \$1500. And so we can say \$1500 plus your insurance, cash surrender value?

A. Yes sir.

Q. Did you have any other assets?

A. There were some stocks that was sold, I think, for \$2600.

Q. Any other property? A. That is all.

(Testimony of Abraham Zemansky.)

Q. You had your furniture? A. No. [436]

Q. No furniture? A. No furniture.

Q. Do you have an automobile?

A. No automobile.

Q. Then your gross cash worth was the figure you have related? A. Yes sir.

Q. Was that approximately the same for a year prior?

A. Absolutely. In fact, I took out more insurance the year before, within the last year, about six months before our bankruptcy.

Q. What do you mean by that?

A. I took out another policy.

Q. It would be approximately the same?

A. It was the same. [437]

DAVID ZEMANSKY,

recalled for further

Direct Examination

Mr. Laugharn: Q. Mr. Dave Zemansky, at the date of this bankruptcy proceeding, what personal assets did you have?

A. I think I filed less than \$100.

Q. Did you have an automobile?

A. No sir.

Q. Did you have any furniture?

A. No sir.

Q. Your estimate, then, of your personal es-

(Testimony of David Zemansky.)

tate, the value of the assets that you yourself had, other than the assets of the co-partnership, was not over \$100? A. Yes sir, less than \$100.

Q. And were those assets of approximately the same value for a year prior to the date of these proceedings; did you have any more assets or less?

A. No sir.

Q. Within a year? A. No sir.

Q. You never had a bank account, had you?

A. I had a bank account quite a long time ago, but it was closed.

Q. But not within a year? [438]

A. No sir.

Q. Your answer was no. Were your assets approximately the same during the period of a year prior to the date of bankruptcy?

A. Personal assets.

Q. What is the answer?

A. The answer is they would be just the same as at the time of the bankruptcy. I never had any more cash at that time.

Q. That is clear enough, unless there is something you are thinking about?

A. No, I never owned an automobile, never owned any real estate.

Cross Examination

By Mr. Dienstag:

Q. That was the ordinary condition with you, all of your assets were in the partnership rather than personally? A. Yes sir.

(Testimony of David Zemansky.)

Q. For years? A. Yes sir. [439]

Mr. Chotiner: It is stipulated by and between counsel that the records of the Hotel St. Francis of San Francisco show that a Sol Zemansky registered there on February 22, 1939. So stipulated, gentlemen?

Mr. Dienstag: I see no objection.

The Referee: All right. He registered February 22, 1939. Proceed.

6

United States
Circuit Court of Appeals
For the Fifth Circuit.

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy, of the estate
of Abraham Zemansky, David Zemansky and Sol Zemansky,
doing business under the fictitious names and styles of Prov-
ident Loan Association and State Loan Office, Bankrupts,
Appellee.

Transcript of Record
In Two Volumes
VOLUME II
Pages 393 to 586

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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No. 10236

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy, of the estate
of Abraham Zemansky, David Zemansky and Sol Zemansky,
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SAM KLEINMAN,

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

The Referee: Be seated, please. What is your name?

The Witness: Sam Kleinman. [442]

Direct Examination

By Mr. Chotiner:

Q. Mr. Kleinman, you are the one who has filed a claim in the Zemansky Brothers' estate in bankruptcy, is that correct? A. Yes.

Q. Now, directing your attention to the time when you first discussed the subject of obtaining security from the Zemanskys, can you tell us when that was?

A. Oh, it was around in January.

Q. Of 1939? A. 1939, yes.

Q. Had you discussed the matter of getting security from the Zemanskys in the last part of 1938?

A. No sir.

Q. Now, where was it that you first asked the Zemanskys for security in January?

A. Well, I was down at San Francisco——

Q. I am sorry. I wonder if you can keep your hand away from your mouth so we can hear you, please.

A. All right. I left the Zemanskys' employment in 1938, the last week in December, I left the Zemanskys' employment. I told them I am going to

(Testimony of Sam Kleinman.)

leave the last of January, told them I was going to leave in January, 1940, but I left a week before.

Q. When you say January, 1940, do you mean January, [443] 1939?

A. January, 1939, yes.

Q. Who did you tell that to?

A. To Sol Zemansky.

Q. When you told that to him, did you say anything at all about getting security?

A. No.

Q. When was the first time then that you really discussed the question of getting security; was that in January? A. In January.

Q. Where did that conversation take place?

A. In my office.

Q. Was that at the Provident Loan Association?

A. The Provident Loan Association.

Q. With whom did you have the conversation?

A. Sol Zemansky.

Q. Tell us what you told him and what he said, if anything?

A. Well, I was gone to San Francisco for the New Year with my daughter, and I came up to see my son-in-law, Mr. Dienstag, and I told him I left the Zemanskys, was no more employed with them.

Q. You told that to your son-in-law, Mr. Dienstag, is that right? A. Yes sir. [444]

(Testimony of Sam Kleinman.)

Q. Now, when you got back to San Francisco, I mean, to Los Angeles, you had a conversation with Sol Zemansky in your office, is that right?

A. Yes sir.

Q. What did you tell Mr. Zemansky about your getting security?

A. Well, I came in there and I had my personal papers in the office in my desk. I was around there. Sol came in. He said "Sam, how are you feeling, how are you feeling?" I said "I am feeling a little better and I am getting rested up." He said "Well, everything is O.K. You are feeling better." I said "Yes." A couple of days later, or maybe it was, I don't remember whether it was two days or three days later he came in my office and talked about different things, and I said to him "Sol, I am no more employed by you and how would you like to give me—you know, I left you; how would you like to give me security for my money?" Sol says, "Why, Sam, anything I can do for you I will be glad to do it for you, give you security if you want it; of course, I don't like to have you leave me, but if you want security I will be glad to give it to you."

Q. Now, when you had that conversation with Mr. Zemansky, had you already left the employ of the Provident Loan Association?

A. Yes sir. [445]

(Testimony of Sam Kleinman.)

Q. When you first started to work at the Provident Loan, did you get \$75 a week salary?

A. Yes sir.

Q. And was that later reduced to \$50 a week?

A. I reduced that salary myself.

Q. When was it that you reduced the salary to \$50 a week?

A. I reduced that salary to \$50 a week when Mr. Sol Zemansky asked me to do him a favor and to stay with him because he would be busy going up the coast and he didn't like to see me leave him, if I only can give him a little time and be around there he will appreciate it if I stayed there.

Q. When was that; was that in 1938?

A. No, that was when I left him in 1939.

Q. Then you came back to work for him in 1939, is that right? A. Yes sir.

Q. That was when you volunteered to take a reduction of salary to \$50 a week?

A. I volunteered, I told him, I said, "Mr. Zemansky, I can't stay around here; I got to be away; my health is not in good shape, and I want to take my time, I want to come in as often as I want and any time that I want to, but it would not be fair to draw the same salary."

Q. Did you tell Mr. Zemansky that the business could [446] not afford to pay you \$75 a week?

A. No sir, Mr. Zemansky told me, "Sam, let's not talk about salary; you can come in and draw

(Testimony of Sam Kleinman.)

the same salary if you want to;" but I said that wasn't fair.

Q. In other words, he told you you could draw the same salary as before, even though you didn't do as much work there, is that it?

A. Yes sir.

Q. When was the next time, Mr. Kleinman, that you discussed the question of getting security with Mr. Sol Zemansky? A. The next time?

Q. Yes.

A. I never discussed it with him again after that time. My son-in-law talked to him.

Q. Then you only discussed the subject once with Mr. Sol Zemansky before Mr. Dienstag started to talk to him about it, is that right?

A. I don't understand the question.

Q. You only discussed the subject with Mr. Sol Zemansky on one occasion, then from then on Mr. Dienstag was the one who carried on the negotiations with him, is that right?

A. Yes, that is right.

Q. You didn't ask Mr. Zemansky on several occasions for security? [447] A. No.

Q. Didn't Mr. Sol Zemansky tell you the first time you asked him for security that he would have to take it up with his brothers? A. Never.

(A short interruption on another matter).

(Testimony of Sam Kleinman.)

Q. Did Sol Zemansky ever tell you at any time that he would have to take up the matter of his giving you security with his brothers?

A. Never.

Q. Now, Mr. Dienstag then came down to Los Angeles from San Francisco at your request, is that right? A. At my request, no.

Q. Who asked Mr. Dienstag to come to Los Angeles to talk to Sol Zemansky about security?

A. Well, I will explain. When I came there at first for the New Year, to San Francisco in 1939, I came in his office; I came in his office and Mr. Dienstag says to me—he didn't know I was going to come, he didn't know, so he said "Hello."

Q. Was this conversation between yourself and Mr. Dienstag? A. Yes.

Q. Well, now, after you came back from San Francisco on New Year's Day, after your visit at New Year's with [448] Mr. Dienstag, you talked to Sol Zemansky about getting security, didn't you?

A. After I came back from San Francisco?

Q. Yes. A. Yes, I did.

Q. Did you talk to Mr. Zemansky before you went to San Francisco for the New Year's Holiday about getting security? A. No.

Q. Then after you talked to Sol Zemansky after New Year's, your son-in-law came down to Los Angeles and talked to Mr. Zemansky about security, is that right? A. Yes sir.

(Testimony of Sam Kleinman.)

Q. Did you ask him to come to Los Angeles?

A. No sir.

Q. Did you hear from Mr. Dienstag that he was coming down on his own accord?

A. Well, I talked to him; I told Mr. Dienstag, he asked me, why did you leave the Zemanskys.

Q. Pardon me. You are going back to the conversation with Mr. Dienstag on New Year's?

A. Yes.

Q. Can you tell us who it was, if anyone, who asked Mr. Dienstag to come to Los Angeles after you had your conversation with Mr. Zemansky?

A. Mr. Dienstag told me himself, if I thought every- [449] thing is all right. I was once more in San Francisco, I was once more in San Francisco.

Q. That was after you had talked to Sol Zemansky?

A. Yes, yes.

Q. It was then that you told Mr. Dienstag about your conversation with Mr. Zemansky, is that right?

A. Yes.

Q. Then it was after that that Mr. Dienstag and you went back to Los Angeles, is that right?

A. No, I went alone. Mr. Dienstag came himself.

Q. Then Mr. Dienstag came to Los Angeles by himself, is that right?

A. Yes sir.

Q. When he came down to Los Angeles, were you in Los Angeles or San Francisco?

A. I was in Los Angeles.

(Testimony of Sam Kleinman.)

Q. Then there was a conversation had between you and Mr. Dienstag and Mr. Sol Zemansky, is that right?

A. When Mr. Dienstag came down, after that, yes.

Q. When was that, if you can remember now?

A. I think it was the last part of—somewhere around in January.

Q. Was it towards the end of January or in the middle?

A. Well, it is awfully hard to tell just when, but it was around January.

Q. By the way, Mr. Dienstag is your son-in-law, is [450] that right? A. Yes sir.

Q. So that our record may be clear, Mrs. Dienstag is your daughter? A. Yes sir.

Q. She is the wife of Mr. Dienstag?

A. Yes sir.

Q. Is that correct? A. Yes sir.

Q. Did you employ Mr. Dienstag as your attorney? A. No.

Q. Where did this conversation take place with Mr. Dienstag, yourself and Sol Zemansky?

A. In my office.

Q. At the Provident? A. Yes sir.

Q. What was said about security?

A. Mr. Dienstag when he came down, he said “Sol, I suppose you understand that I understand Sam talked to you that he wanted—he is no more employed by you, and he wants his money secured and what kind of security have you to give him.”

(Testimony of Sam Kleinman.)

Q. What did Mr. Zemansky say, if anything?

A. Mr. Zemansky said to him, to Mr. Dienstag, "Well, you see, Eddie"—he called him Eddie; he said "Eddie, we are in all kinds of enterprises; we need a lot of money. [451] We have a lot of pledges in the Loan Department, a lot of them, and I would like to give him security in loans, but there is a law where a pawnbroker cannot re-loan any pledges."

Q. Is that what Mr. Zemansky said at that time?

A. Yes sir.

Q. What else was said about giving security?

A. So they had been talking about the legal points, and Mr. Zemansky said "I was the one who put that law in effect and I know what I am talking about."

Q. Did Mr. Dienstag say that he could work it out so it would be legal to give pledges for security?

A. No.

Q. Was anything like that said by Mr. Dienstag at any time?

A. I believe at that time—do you want a reference to the same time or after?

The Referee: Why don't you keep him on this one conversation?

Mr. Chotiner: Go ahead and give us the rest of the conversation that took place.

A. So Mr. Zemansky says to Mr. Dienstag, "I can show you a pawn-ticket where it has printed on the back of it where the law prescribes that

(Testimony of Sam Kleinman.)

I cannot do that.” So Mr. Dienstag said, “Well, I am not acquainted with that law, never looked into it, but if you can give me the ticket [452] I will look into it.” So I believe Mr. Dienstag and Sol Zemansky left the office and about late in the afternoon it seems Mr. Dienstag showed me a pink ticket, a pawn-ticket, from the State Loan Office on Main Street.

Q. Was Mr. Zemansky there at that time?

A. When that was shown to me?

Q. Yes. A. Yes sir.

Q. Was anything else said then?

A. No, not much.

Q. When you say “not much,” was anything at all said about your getting security?

A. Well, Mr. Dienstag says “I will go home; I have to be back in San Francisco, and I will look into it and see, look into that law.”

Q. That was the end of that first conversation then, at which Mr. Dienstag was present and you discussed security, is that right? A. Yes.

Q. Did you or Mr. Dienstag ask Mr. Zemansky if he had any other kind of security which he could give?

A. No, that was not discussed at all.

Q. That was not even mentioned at all in that conversation, was it? A. No.

Q. Had you discussed with Mr. Zemansky before that [453] time about getting any other kind of security? A. Me?

(Testimony of Sam Kleinman.)

Q. Yes. A. No.

Q. Then your son-in-law went back to San Francisco?
A. Yes sir.

Q. Did he come back again to Los Angeles and talk with Mr. Zemansky about security?

A. Yes, he did come back.

Q. About how long after the first conversation that he had with him was it that he came back?

A. I think—it must have been around the next month, in February.

Q. Was that the first part of February?

(A short interruption on another matter).

Mr. Chotiner: Q. Now, getting back to this first conversation when Mr. Dienstag was present and Mr. Zemansky told you that under the law he could not give you those pledges as security; is that right?

A. He didn't tell me that; but he talked to Mr. Dienstag about it.

Q. He told Mr. Dienstag that, isn't that true?

A. Yes sir.

Q. And you were present?

A. Yes sir. [454]

Q. It was then that Mr. Dienstag said, "I will have to look into the law (in substance and effect) and see if I can work out some way where you can give the security."

A. No, he didn't say that; I didn't hear him say that, but he gave him the ticket and told him, "You can look into it and if it could be done I will be more than glad to do it for you."

(Testimony of Sam Kleinman.)

Q. Then the second time Mr. Dienstag came down was in the first part of February, is that right?

A. The first part of February.

Q. Or when was it, Mr. Kleinman?

A. It was in February.

Q. In February? A. Yes.

Q. Have you any way of remembering now whether it was before Lincoln's Birthday or not?

A. No.

Q. Have you any way of fixing the time when it was that that second conversation took place with Mr. Dienstag? A. I don't know.

Q. It took place at the office of the Provident?

A. Yes.

Q. Who was present?

A. Mr. Sol Zemansky, Mr. Dienstag and myself.

Q. What was said by the people who were there? A. Well,— [455]

Q. About security?

A. About the security; Mr. Dienstag talked to Mr. Zemansky; Mr. Dienstag talked to Mr. Zemansky and they were talking some legal words, legal words, a lot of words I didn't understand about that at all.

Q. Do you remember what Mr. Dienstag was saying about the legal points? A. Yes sir.

Q. What did he say?

(Testimony of Sam Kleinman.)

A. He said to him, "Sol, I think you are right, that you cannot take possession of any pawns, of any merchandise that is pawned by you, but I've got a way; I looked up the law and I have a way where we can have security on the pawn-tickets."

Q. Did Mr. Dienstag tell him what that way was?

A. Well, he talked to him on some legal points, you know, which I could not understand.

Q. Well, did you hear, or do you remember how he told Mr. Zemansky this could be worked out, what the way was that they could do it?

A. He just had a rough sketch of it and they were talking about it and Mr. Dienstag told Mr. Zemansky, "I will go back to my office and I will work it out just the way it should be done and I will come back and show it to you."

Q. Was he acting as your attorney at that time?

A. As my attorney? [456]

Q. Yes. A. Mr. Dienstag?

Q. Yes.

A. Well, I don't know. I believe he hired Mr. Wolver and Mr. Ted Horn and Mr. Miller.

Q. At that time were Mr. Wolver, Mr. Miller and Mr. Horn discussing this question of security?

A. That I don't know.

Q. At any rate, you had a lot of confidence in Mr. Dienstag's ability as a lawyer when you took those matters up with him, didn't you?

(Testimony of Sam Kleinman.)

A. Well, I don't know; I never had very much to do with lawyers.

Q. What did Mr. Zemansky say when Mr. Dienstag told him that he had a way that he could work things out? A. Mr. Zemansky?

Q. Yes, what did he say to that?

A. Well, Mr. Zemansky said to Mr. Dienstag, "Anything you do, if you think it is legal, it is all right; I will be more than satisfied."

Q. Did Mr. Zemansky say whether he agreed with Mr. Dienstag that it could be worked out that way? A. I can't understand that.

Q. Did Mr. Zemansky agree with Mr. Dienstag when Mr. Dienstag said he had a way and explained how it could be worked out? [457]

A. He asked him to work it out and "If you work it out and if it is legal, I am satisfied."

Q. That was about the end of that conversation, is that right? A. Yes.

Q. Now, was there another time that Mr. Dienstag came down to Los Angeles to see Mr. Zemansky about the giving of security, or was it the next time that it was taken up in Los Angeles?

A. That was the time when Mr. Dienstag worked the plan out and came back to Mr. Zemansky, and he had some kind of yellow sheet in his hand, and he had it all written up in the rough.

Q. When was that, Mr. Kleinman?

A. That was in February.

Q. In February. A. Yes.

(Testimony of Sam Kleinman.)

Q. Was Mr. Zemansky here in Los Angeles at that time? A. Yes sir.

Q. And can you help fix what time in February this was? This was the third trip now.

A. There was a trip——

Q. It was the third time that he came to Los Angeles to talk it over with Mr. Zemansky?

A. Well, let's see; that was the second trip.

Q. The second trip? [458] A. Yes sir.

Q. In other words, on the second time, Mr. Dienstag didn't go back to San Francisco then, did he, but he brought a yellow paper in? A. No.

Q. Then, how long after the time when he had discussed the legal points with Mr. Zemansky was it that Mr. Dienstag came back to the Provident with this yellow paper?

A. That was the third time.

Q. The third time? A. Yes.

Q. How long after the second time was it that he came back with the yellow paper?

A. It must have been a couple of weeks, a week.

Q. A week or so? A. Yes.

Q. By that time it was getting towards the end of February, is that right?

A. Around the middle of February.

Q. Around the middle of February?

A. Yes sir.

Q. Where did the conversation take place between Mr. Zemansky and Mr. Dienstag and yourself

(Testimony of Sam Kleinman.)

when Mr. Dienstag had the yellow piece of paper; was that at the Provident?

A. At the Provident, in my office.

Q. What was said at that time? [459]

A. At that time Mr. Dienstag was talking to Mr. Zemansky and read that, talked to him, read to him, you know, about the contract, and all at once Sol Zemansky took the paper from Mr. Dienstag in his own hands and read it over; you know, he read over the points of law and everything, the way the contract should be written and Mr. Zemansky said, "Mr. Dienstag, that just looks wonderful to me, that looks fine to me."

Q. What did Mr. Dienstag say, if you know?

A. He said, "Sol, I think that is the right way to do it; that is the right kind of a contract."

Q. When was the next time that Mr. Dienstag and Mr. Zemansky and you had a conversation regarding this question of security?

A. Mr. Dienstag and Mr. Zemansky? That was about the time when Mr. Dienstag already had that contract made out, already made out.

Q. Now, the next time Mr. Dienstag appeared in regard to this question of security, the contract is already made out on white legal paper, is that right?

A. Yes.

Q. Now, you remember when the Simon attachment was placed on the business, don't you?

A. Do I remember?

(Testimony of Sam Kleinman.)

Q. Yes sir, you remember the occasion, don't you?

A. Well, I knew when I came down from San Francisco. [460] I was at that time in San Francisco.

Q. Now, in reference to the time when you heard about the attachment, was this contract on white paper already drawn up? A. Yes sir.

Q. Were you present when the contract was signed?

A. Yes sir,—no, when I signed it, not when the others; I was there when the others signed, but I signed first.

Q. Where did you sign the contract?

A. I signed it before Mr. Dienstag left Los Angeles.

Q. When was it Mr. Dienstag left Los Angeles?

A. Well, when he had the contract all prepared and ready to sign, and everything, he came up first to me and read the contract to me, read the contract to me and explained to me everything, and then he said, "Sam, you sign here," and I signed two contracts, and then Mr. Dienstag was asking for Sol Zemansky and they told him, told Mr. Dienstag——

Q. Who told Mr. Dienstag?

A. Abe Zemansky; that Sol Zemansky was called out of town in a hurry and he would be back in a day or two. Mr. [461] Dienstag says, "I am very sorry; I worked awfully hard on that contract

(Testimony of Sam Kleinman.)

and I got to be in San Francisco." So Mr. Dienstag said, "I am going to leave tonight," and he left that very night for San Francisco.

Q. Did Mr. Abe Zemansky tell Mr. Dienstag where Mr. Sol Zemansky was?

A. He said in San Francisco or in Oakland.

Q. Did you go with Mr. Dienstag to San Francisco that time? A. No sir.

Q. You stayed in Los Angeles, is that right?

A. Yes sir.

Q. Now, when you signed the contract, you already knew that the Zemanskys were having trouble with the Simons people, didn't you?

A. No sir.

Q. Had you ever heard of any difficulties of any kind with the Simons? A. No sir.

Q. Didn't you know, Mr. Kleinman, that Judge Pacht had called in Mr. Sol Zemansky within a month's time prior to signing your contract and worked out an arrangement with Mr. Zemansky whereby the rate of interest was going to be cut from twelve per cent to six per cent?

A. No sir.

Q. Did Sol Zemansky tell you that he had fixed [462] everything up with the Simons people?

A. No sir.

Q. Didn't he tell you that you had nothing to worry about or that he had nothing to worry about as far as the Simons people were concerned?

A. No sir.

(Testimony of Sam Kleinman.)

Q. Was that subject discussed so far as the Gans account was concerned? A. No sir.

Q. Now, directing your attention to the time when the attachment was put on by the Simons people, for the purpose of helping you fix the time when it occurred, your attorneys and we have stipulated that that attachment was placed on February 27, 1939. Incidentally, I have verified the date, and that is the correct date. Now, fixing that as February 27, when the attachment was run, you were in San Francisco at that time; is that right?

A. When what?

Q. When the attachment was placed on the business? A. Yes, I was in San Francisco.

Q. And you received a telephone call from Mr. Sol Zemansky, is that right? A. Yes sir.

Q. And he told you "Sam, the Sheriff has placed an attachment here on account of the Simons' account," is that right? [463]

A. No sir.

Q. What did he tell you, if anything?

A. When I was in San Francisco, I was in my daughter's home, the phone rang and Mr. Dienstag answered the phone. Mr. Dienstag was right by the phone and he answered the phone and I heard Mr. Dienstag go to the phone and say "Hello" and about a minute later he said, "Hello"; I heard him say "Hello, Sol"; then Mr. Dienstag called me to the phone and he said, "Sam, Sol Zemansky wants to talk to you"; so I took the receiver and talked

(Testimony of Sam Kleinman.)

to Mr. Sol Zemansky and he said "Hello, Sam"; I said "Hello." He said "Sam, you know we need a lot of money pretty quick, we need a lot of money pretty quick," talking fast, and I said "Well, that is all right if you need a lot of money, what do you want." He said "I want you to be down here early in the morning," or I mean "I want you to come down as quick as you can by airplane; we need around about \$25,000 or \$30,000."

Q. Did Mr. Zemansky ask you to bring Mr. Dienstag with you? A. No sir.

Q. Did Mr. Dienstag go with you to Los Angeles?

A. Well, I got through with the conversation with Mr. Zemansky and I told him I am going to take the plane tomorrow morning, I am not going to take any plane tonight.

Q. Now, Mr. Kleinman, was anything said at that time by Mr. Zemansky in that telephone conversation that there [464] was an attachment?

A. No sir.

Q. Now, the next morning you took a plane to Los Angeles?

A. The next morning, about 9:00 o'clock, I took the plane from San Francisco, from the St. Francis Hotel, where the bus leaves there to the Airport.

Q. Mr. Dienstag went with you on the airplane, did he?

A. I told Mr. Dienstag, the time when I talked to Sol Zemansky, he wants me to come down as

(Testimony of Sam Kleinman.)

quickly as possible and that I am going to take a plane tomorrow morning, and Mr. Dienstag says "Well, I have to be in Los Angeles myself; I might as well go with you."

Q. Did Mr. Dienstag tell you before the telephone call came that he was going to Los Angeles the next day?

A. He never discussed business with me.

Q. Then, when you arrived in Los Angeles, you went straight to the Provident Loan office, is that right?

A. We arrived at the Biltmore Hotel and from the Biltmore we walked right up to the Provident Loan.

Q. You saw Sol Zemansky there?

A. We came in the front room, Sol was leaning on the showcase there and we came in and he said "Hello, boys," and we walked right into my office.

Q. You also saw a Deputy Sheriff there at that time, didn't you? [465]

A. No sir.

Q. Was there a Deputy Sheriff there that day?

A. I found out after I talked to Sol Zemansky.

Q. Well, that was that same morning, isn't that right?

A. We arrived around about 12:30 at the Biltmore Hotel, and it took about five or ten minutes to walk up there.

Q. Then you went into the office of the Provident and you and Mr. Dienstag and Sol Zemansky had a conversation, didn't you?

(Testimony of Sam Kleinman.)

A. When I got up to the Provident in my office, Mr. Dienstag put his brief case away and Sol Zemansky started to tell us about owing a lot of money to Simons and they attached it, and we got to raise money quick to get the Sheriff out of here.

Q. That was when he told you the Sheriff was in there? A. Yes.

Q. What did you or Mr. Dienstag say then?

A. Well, Mr. Dienstag didn't say very much, but I did. I said "Sol, why don't you—you say you got a lot of goods on hand—why don't you go to work and pick out some goods, give me a quarter million dollars worth of merchandise and I will go out and sell it."

Q. At the time you told that to Sol Zemansky, you had been selling merchandise for Zemansky Brothers for a period of years, isn't that right?

[466]

A. Oh, yes.

Mr. Miller: Objected to as incompetent and irrelevant.

The Referee: Overruled.

A. Yes.

Mr. Chotiner: Q. When you first started selling merchandise, there was quite a lot of merchandise for you to sell down there?

A. Yes, any time they brought out the merchandise I sold it.

Q. They gave you quite a bit of merchandise to sell, isn't that right, and you received a one per cent commission on your sales, isn't that true?

(Testimony of Sam Kleinman.)

A. Yes sir.

Q. Then in 1938, the amount of merchandise that they were giving you to sell was beginning to fall off, was it?

A. No, I don't believe so.

Q. Were they giving you as much merchandise to sell in 1938 as they had given you when you first started to work up there?

A. They just simply didn't want to give it to me.

Q. What else was said at that conversation down at the Provident that you have related? That is the time when you found out about the attachment?

A. Yes. So Mr. Zemansky said to Mr. Dienstag "When do you expect to go back to San Francisco; how long do you expect to stay here?" So after Mr. Dienstag said [467] "Oh, maybe a day or two, no longer," he said to him "Will you be around off and on, around the office here?" Mr. Dienstag says "Yes." So Mr. Dienstag came up in the afternoon, and he said "I got a way of how to settle that difficulty with Mr. Simon."

Q. Who said that? A. Mr. Sol Zemansky.

Q. What did Mr. Dienstag or you say to that?

A. Mr. Dienstag said "It is O.K. with me any way you do it."

Q. Did you go over to Judge Pacht's office any time that day? A. No sir.

Q. Did you go to Judge Pacht's office that night?

(Testimony of Sam Kleinman.)

A. We went that night to Judge Pacht's office.

Q. Who asked you to go to Judge Pacht's office, if anyone?

A. Well, I think after that Mr. Sol Zemansky said to Mr. Dienstag and myself, "Let's go out and have dinner"; so Sol Zemansky asked us to go over to the Good Fellows Grotto on Main Street.

Mr. Wolver: Can we take a short recess?

The Referee: We don't usually take a recess during the morning, but out of deference to this witness, we will take a ten minutes' recess in the Zemansky case at this time. In all other cases, please remain here. There is [468] no recess in any other case.

(After recess).

Mr. Chotiner: Q. After you had dinner, the three of you went to Judge Pacht's office, is that right?

A. No sir; after we had dinner, we went up to the Provident Loan, went up to the Provident Loan and Sol Zemansky called up Judge Pacht and he said "Judge, I am coming up." That's all I heard.

Q. Then, did the three of you go to Judge Pacht's office?

A. Then Mr. Zemansky asked Mr. Dienstag, would he mind going along with him, and he asked me if I wanted to go along, too.

Q. About what time in the evening was it that Mr. Zemansky called Judge Pacht?

(Testimony of Sam Kleinman.)

A. That was after we had dinner in the Good Fellows Grotto and we went back to the Provident.

Q. Do you know whether or not Mr. Zemansky had called Judge Pacht before that time, telling him he would be coming over?

A. No sir, I didn't know that.

Q. At any rate, you don't know of any appointment that might have been made with Judge Pacht earlier that day, do you? A. No.

Q. It was after dark when Sol Zemansky called Judge [469] Pacht, was it? A. Yes.

Q. Then the three of you went over to Judge Pacht's office, isn't that right? A. Yes sir.

Q. And a conversation took place with Judge Pacht about the Simons' account, is that true?

A. Well, as I remember, we came up in Judge Pacht's office, walked through a long hall, and Judge Pacht was coming from some place and he said to Mr. Sol Zemansky, "Hello, Sol" and Sol says "We are coming in right now, we are coming in."

Q. After you got in Judge Pacht's office, there was a conversation held about the Simons' account, was there? A. Yes sir, they were talking.

Q. What were they saying?

A. Well, Sol Zemansky made some kind of a proposition to Judge Pacht about the money they owed them, and Mr. Dienstag was sitting there and Judge Pacht, Bill Simon and Mr. Lyman, and they

(Testimony of Sam Kleinman.)

were discussing the matter; they were discussing the matter, and Sol Zemansky says, made him some proposition to secure his loan.

Q. Who first mentioned the subject about giving security for the Simons' account?

A. Mr. Zemansky.

Q. And had Judge Pacht asked Mr. Zemansky to pay off [470] the money that was owing Simons before the security was mentioned?

A. No, not as I remember.

Q. Did Mr. Zemansky ask Judge Pacht to release the attachment? A. What is that?

Q. Did Mr. Zemansky ask Judge Pacht to release the attachment?

A. Not at that minute, no.

Q. Did Mr. Zemansky talk about security with Judge Pacht before he asked him to release the attachment?

A. He talked to him and he told him, he said "How about securing your loan, about securing your loan" and then Mr. Zemansky said, "I think Mr. Dienstag will be able to explain the way they can do it more than I can"; so Mr. Dienstag talked to Judge Pacht about different laws, various different ways how it could be done; I could not understand the way they were talking about the law; I just sat there and listened, so when that was through, when they were through talking the law and the agreement and the way they should go to secure it, so the Judge called out Mr. Simon and Mr. Lyman in the

(Testimony of Sam Kleinman.)

hall and they stayed out there for quite a while, a few minutes, they [471] stayed out there for a few minutes. After the Judge came back and sat down and I sat down, the Judge said "Well, it will be all right; I will be satisfied; but I want you to tell me one thing and I want you to tell me right now, are you solvent before I go any further?" Mr. Sol Zemansky said "We are solvent one hundred per cent."

Q. You remember that very distinctly?

A. Absolutely. [472]

Q. Now, Mr. Kleinman, did you tell Mr. Zemansky that he could use some of the pledges that had been given to you for security in order to help make up the security for the Simons?

A. When.

Q. At any time?

A. That came up after, after they agreed. [473]

Q. And did Mr. Zemansky ask you if he could use some of the pledges that had been given to you?

A. That came out this way. It was about—it wasn't very long for Mr. Dienstag to leave town and Mr. Dienstag said to Mr. Zemansky, "You got to hurry up because I can't be here any longer and I did all I could for you to help you out." So Mr. Zemansky came over to me and says "Mr. Kleinman, how about using some of your pledges, to replace the exact amount of pledges for Simons, and then we will pick out other pledges for you." [475]

(Testimony of Sam Kleinman.)

Q. Did you ever go back to work for the Zeman-skys after you left their employ?

A. After I left their employ, yes, sure.

Q. When did you go back to work there?

A. I went back to work for them—it would be awfully hard for me to tell if it was two months or maybe a few days later, but I promised Sol I will go back and help him out but not to ask me any more to come back when I got through again. He said “No more than a few months.”

Q. Now, Mr. Kleinman, how long was it that you were away from their employment before you went back to work?

A. I just got through telling you. It was the last, I remember the last week in December, 1938, before I went [477] up to San Francisco for the New Year, and then it was January, I am sure about that, and it was most of February.

Q. When you went back to work, was that after the contract was signed or before the contract?

A. Which contract?

Q. The one of February 24, 1939, when you first got your security?

A. After.

Q. It was after the contract was signed?

A. Yes sir.

Q. Now, was it after the security had been given to the Simons people, or before that?

A. I believe a little before that. [478]

Q. Now, Mr. Kleinman, there were some notes that were given to you before February 24, 1939.

(Testimony of Sam Kleinman.)

I believe these notes were given to you around 1936 and they called for interest at ten per cent. Do you recall having notes that called for ten per cent interest?

A. Changed once from one note to another note.

Q. That was some time in 1936?

A. Well, the best way to tell is by the notes, the date.

Q. But, at any rate, that was before the contract was signed about the security, wasn't it?

A. The contract of what?

Q. Well, Mr. Kleinman, we will get at it this way. [481] On February 24, 1939, there was a contract about security that was signed by you and the Zemansky Brothers, dated February 24th?

A. Yes sir.

Q. Before that time, there had been a series of notes given to you where the rate of interest was changed from twelve to ten per cent, isn't that right?

A. There were, but I don't know which year. The notes will tell when it was.

Q. At least, it was a couple years before that, wasn't it, before this security contract was signed?

A. The notes will tell.

Q. Don't you remember whether it was approximately at least a couple of years before the contract of security was signed?

A. I could not absolutely tell that time because the notes will be easier to tell when I changed them.

(Testimony of Sam Kleinman.)

Q. Well, you had some notes before the contract was signed that called for ten per cent interest, didn't you? A. Yes sir.

Q. You were paid twelve per cent interest on those notes, weren't you?

A. I am supposed to get that; I am supposed to get twelve.

Q. You are supposed to get twelve?

A. Yes sir. [482]

Q. Now, the Zemanskys agreed to pay you twelve per cent interest on the notes, even though they only said ten per cent, isn't that right?

A. No sir, no sir.

Q. What did you mean when you said you were supposed to get twelve per cent?

A. The notes call for twelve per cent.

Q. Well, there were some notes that called for ten per cent, also, weren't there?

A. No, not at that time.

The Referee: What time are you talking about?

A. Who, me?

Q. Yes; you say "not at that time"; what time are you talking about?

A. The notes I got when I first started to do business with them. They changed the notes calling for twelve per cent.

Q. They paid you twelve per cent?

A. I believe they paid me twelve per cent; I never figured it up.

(Testimony of Sam Kleinman.)

Q. And then later on there were other notes?

A. Later on they changed those notes to ten per cent.

Q. Now, the question is, after the notes were changed to ten per cent, at what rate of interest were you paid, ten per cent or twelve per cent?

A. Well, I was getting—I never figured up, your [483] Honor, but I had a lot of money with them, and at one time they gave me a check for interest for a month, which I believe was around \$500. I said “Solly, it looks to me like I am getting the same amount of interest as I was getting the last time.” He said “You got some I.O.U.’s; you are not getting any more than ten per cent.”

Q. (By Mr. Chotiner): Mr. Kleinman, before the notes were changed from twelve to ten per cent, there was a check given you every month for \$500, which was given to you as interest on \$50,000; isn’t that right?

A. I never went through my notes. I always had my notes in a safety deposit box. I never figured how much I had with them. I relied on their honesty to give me the right kind of interest. What I mean to say, I believed they would give me the right kind of interest, but when we changed the notes from twelve per cent to ten per cent, I noticed that one check, that \$500 check, and I said “Solly, it looks to me like you are keeping on giving me the same of kind of interest.” He said “You are not getting any more than ten per cent; you know

(Testimony of Sam Kleinman.)

you have given us a lot of I.O.U.'s, day by day; we still have a lot of I.O.U.'s we owe you." I said "Well, I hope you keep track of them." He said "We take care of your bookkeeping," which I never did, never took care of my bookkeeping at all. [484]

The Referee: Q. Mr. Kleinman, when you had your conversation with Mr. Sol Zemansky, in which he told you that Simons had attached, you said that you said to him "Well, give me a quarter of a million dollars worth of merchandise and I will go out and sell it for you?" A. Yes sir.

Q. Is that what you said to him?

A. Well, I said I could sell a quarter of a million dollars worth of merchandise in one month.

Q. What did he say?

A. Well, he kind of looked at me and he said, "Well, I will see you later on." I believe later on he said "There's no use trying to sell goods right now. I know if I had to sell goods now in a hurry to satisfy payments, I know how I would sell them. I would rather not sell any goods right now."

Q. Is it or is it not a fact that you borrowed some money from a bank and in turn loaned it to the Zemanskys, on which they paid you seven per cent interest? A. No sir.

Q. That is not a fact?

A. No sir, no sir.

Q. Was there any of your money that you had with the Zemanskys that you only got seven per cent on? A. Yes, your Honor.

(Testimony of Sam Kleinman.)

Q. But you had not borrowed that money from a bank? [485] A. No sir.

Q. That was your own money?

A. My own money, your Honor.

Q. There were times when you used to take money or borrow money from the cash drawer and put in I.O.U.'s, isn't that true?

A. I will tell you what that was.

Q. Did you, first of all, did you ever do that?

A. Yes sir.

Q. Now, when you put the money back, you took the I.O.U.'s out, or they were given back to you and you destroyed them, isn't that true?

A. That money I put in there, I remember one time I put that in there.

Q. Mr. Kleinman, pardon me for interrupting.

Mr. Wolver: I submit the witness may answer.

Mr. Chotiner: I think it calls for a yes or no answer, then he may explain it further. Read the question.

(Question read.) [486]

The Referee: Answer whether you destroyed the I.O.U.'s or not. A. No sir.

Q. (By Mr. Chotiner): When you put the money back?

Mr. Wolver: The witness has evidenced a desire to explain that last answer. I submit the witness should have the right to explain his answer.

The Referee: Go ahead, Mr. Kleinman, what do you want to say about these I.O.U.'s?

(Testimony of Sam Kleinman.)

A. If I needed a little ready cash, I used to go where Mr. Kravitz had charge of the Loan Department and I said "I need \$50," and I made out an I.O.U. and got the \$50. I believe that was only once or twice or maybe three times.

Q. (By Mr. Chotiner): When you put the money back, you would get the I.O.U.'s back, wouldn't you?

A. I never put that money back.

Mr. Chotiner: May I have Trustee's Exhibit A for identification?

Q. I now show you Trustee's Exhibit A for identification, consisting of three slips of paper; the first is dated March 29, 1939, and bears the figures "558, \$200," and then the name of Sam Kleinman.

A. I have never seen that.

Q. Wait a minute. On March 29, 1939, did you receive \$200 from Zemansky Brothers, or anyone there?

A. No sir. [487]

Q. Mr. Kleinman, did you ever receive \$200 around that time of March 29, 1939, and didn't sign an I.O.U. for it?

A. Not that I know of.

Q. Have you any explanation to offer regarding that tab, that says "200" on it and the name "Sam Kleinman" on it?

Mr. Wolver: That is objected to as calling for the conclusion of the witness and being incompetent, irrelevant and immaterial. If he knows nothing about it, how can he explain?

The Referee: Read the question, please?

(Question read.)

(Testimony of Sam Kleinman.)

The Referee: Overruled. How can you explain why that ticket is there?

Mr. Wolver: I am going to object to the Court's question, your Honor, on the ground that it is incompetent, irrelevant and immaterial, calls for the conclusion of the witness and is argumentative.

The Referee: All right. Can you explain?

The Witness: Your Honor,—

The Referee: Just a minute. Can you explain how that ticket happened to be found by the Trustee in Bankruptcy among the papers of this bankrupt company? A. I can't.

Q. You don't know? [488]

A. No.

Mr. Wolver: May I submit, in fairness to the witness, he should be asked if he ever saw it before.

The Witness: I never saw it before, never saw it before.

The Referee: He said he didn't.

Q. (By Mr. Chotiner): Now, I will show you a tab dated July 5, 1939, \$50. A. Yes sir.

Q. Signed Sam Kleinman.

A. That is mine.

Q. Did you ever pay back that \$50?

A. No sir.

Q. One dated July 6th, 1939, for \$50, Sam Kleinman; did you receive that \$50? A. Yes sir.

Q. Did you ever pay back that \$50?

A. No sir.

(Testimony of Sam Kleinman.)

Mr. Chotiner: At this time, we will offer the tabs dated July 5 and July 6, 1939, as Trustee's Exhibit next in order in evidence.

The Referee: From Trustee's Exhibit A there are now being removed the tabs dated July 5, 1939, for \$50, and July 6, 1939, and Trustee's Exhibit A for identification now consists only of the tab dated March 29, 1939, and the envelope marked "1939, Sam Kleinman." The two tabs of [489] July 5 and July 6 will be received in evidence as Trustee's Exhibit 11. We had marked as Exhibit 11 the schedules which you decided you did not want to offer in evidence, the individual schedules, so we canceled that exhibit number. These are now Trustee's Exhibit 11.

TRUSTEE'S EXHIBIT No. 11

Jul 5 - 1939—50.00

S KLEINMAN

Jul 6 - 1939—50.00

S KLEINMAN

[Endorsed]: Filed Aug. 26, 1940.

(Testimony of Sam Kleinman.)

Q. (By Mr. Chotiner): Now, Mr. Kleinman, can you tell us how much commissions were owing to you at the time the petition was filed by the Zemansky Brothers?

A. That means 1939?

Q. Any commissions that were owing to you up to the time that they filed their petition in this bankruptcy proceeding?

A. Well, my attorney just asked me to give him a rough estimate. I told him I hadn't figured up the books, I didn't have a chance to figure the books up.

Q. Do you have any records that show the amount of money that was coming to you as commissions?

A. The record is on the books.

Q. Up to what date did they pay you up?

A. They paid me up to 1940.

Q. 1940 or 1939?

A. 1939, pardon me.

Q. To June?

A. Well, January I was paid up.

Q. In other words, on January 1st, 1939 you were all paid up? [490]

A. Not the first, they never paid me just on the minute.

Q. When in your opinion was it that you were paid up to?

A. They used to pay me up, I believe I was paid up to January, 1939, but it was paid up for 1938.

Q. I understand. When was it that you were paid your commissions to the end of 1938?

(Testimony of Sam Kleinman.)

A. When was it what?

Q. When did you receive the check for paying up those commissions you just told us about?

A. I didn't keep track of them.

Q. You claim the Zemanskys owe you \$750, at least, that is one of the items in your claim?

A. Yes sir.

Q. Does that include the I.O.U.'s for \$350?

A. The I.O.U.'s,—I told them—

Q. Mr. Kleinman, can you answer that question yes or no?

Mr. Dienstag: The claim is the best evidence.

The Referee: He asked him this question, which Mr. Kleinman certainly can answer. You have put in an item of \$750. Does that include the I.O.U.'s for \$350? A. I think so.

Q. You think so? A. Yes.

The Referee: All right. [491]

Q. (By Mr. Chotiner): How much in dollars and cents worth of jewelry did you sell in 1939 for the Zemanskys?

A. I am going to tell you the same way as I told my attorney when he asked me. May I, your Honor?

The Referee: Yes, go ahead.

A. He asked me, do you know the real amount you have sold? I said "I hadn't had a chance to figure up the books and the Receiver has the books now."

Mr. Wolver: Will you produce Mr. Kleinman's books, receipt of which we have from the Receiver,

(Testimony of Sam Kleinman.)

in court this afternoon so we may have his books here?

Mr. Laugharn: The books have always been available for the claimant to make his claim up from. He has never been denied access to them. Before he signed his claim, he had the right to see the books.

Mr. Wolver: The record will show that Mr. Kleinman was in San Francisco when he made his claim.

The Referee: I don't think you should make up a claim on the witness stand. If you haven't had access to these books, the Court will put them at your disposal, but to examine the books before Mr. Kleinman goes on the stand and then state what his claim is. Can the books be here this afternoon?

Mr. Laugharn: Anything the Trustee has can be here if available.

The Referee: Let's find out what you are asking for. [492]

Mr. Dienstag: They are the books which will show the sales, being duplicate copies, showing the amount of the sales and the dates upon which they were sold.

The Referee: From what?

Mr. Dienstag: Well, the witness has stated he was paid to the first of January, 1939, so we would want the period from January 1st, 1939 until the date of filing of the petition.

The Referee: Now, what records of Zemanskys

(Testimony of Sam Kleinman.)

would show the payments, if any, to Mr. Kleinman of those commissions?

Mr. Dienstag: I don't know.

The Referee: We should have both. We should have the sales record and the record showing the payments.

Mr. Dienstag: Mr. Yates has examined those books. Perhaps he can enlighten us on whether or not those amounts appeared or not.

Mr. Wolver: He hasn't examined these books.

The Referee: Just a minute, let's ask him. You heard what Mr. Dienstag said, that you had examined the books that he is now asking for, is that so?

Mr. Yates: I have.

The Referee: You have?

Mr. Yates: I have.

Mr. Dienstag: Mr. Yates has told me has examined the books showing payments by the bankrupt, which was what [493] I think your Honor was speaking about.

The Referee: Have you examined the sales records?

Mr. Yates: I have not.

The Referee: You have not, but you have examined the records showing payments made to Mr. Kleinman on commission?

Mr. Yates: That has not been broken down. It is not reflected in the books, your Honor.

Mr. Laugharn: I think we can settle this. There

(Testimony of Sam Kleinman.)

is no question but what from the evidence it is the claimant's contention that he was paid up to 1939, so we have a period from January, 1939, to bankruptcy. Now, the witness is quite positive that he has been paid no commissions in that period. I think we can have the records available showing what the Kleinman sales were upon which he says he is entitled to the one per cent.

The Referee: I think the claimant is entitled to see the original records of the Zemansky Brothers relating to the sales made by him of merchandise and the payments made to him on account of commissions on those sales.

(Discussion between Court and counsel with reference to checking books during the noon hour.)

Mr. Chotiner: There is one question I would like to ask now and take a yes or no answer.

Q. Did you keep any records yourself of the sales of jewelry you made in 1939?

A. I never kept any records. [494]

By Mr. Chotiner:

Q. Mr. Kleinman, after the security contract was signed by you and the Zemansky Brothers, and redemptions would be made of that security, when customers would come in to redeem some of the peldges every few days or so, a new contract would be made out, isn't that correct?

A. Yes sir.

Q. And whenever a new contract would be made

(Testimony of Sam Kleinman.)

out, a new promissory note would also be made out, isn't that right? A. Yes sir

Q. At that time, you would issue a check to Zemansky Brothers for the amount shown in the promissory note, isn't that true, at least, at the beginning?

A. I can't understand that question.

Q. I will withdraw the question. At the time the new note and the new contract would be made out, you would issue a check to Zemansky Brothers, isn't that right? A. Yes sir.

Q. And you and Abe Zemansky would go down to the Union [496] Bank and Abe got the check cashed?

A. Yes. The first time I did, the first couple of times.

Q. And when Mr. Zemansky cashed the check, he would give you the money, isn't that right?

A. He came back to the office and handed me the money.

Q. Did you go to the bank with him?

A. Just a couple of times.

Q. When he would cash the check the first couple of times that you went with him, he would give you the money right there in the Union Bank, wouldn't he?

A. No, he usually held it in his pocket and when we got to the office he would give it to me.

Q. Then he would give it to you? A. Yes.

Q. Then you would deposit the money back in the account again?

(Testimony of Sam Kleinman.)

A. Sometimes I did; sometimes I left it in the drawer.

Q. And Mr. Zemansky, Abe Zemansky, told you that the teller wanted to know why the money was being deposited back in the account again?

A. Well, I would like to explain that.

Q. Did Mr. Abe Zemansky tell you that?

A. What?

Q. Did Mr. Abe Zemansky tell you that the teller at the Union Bank wanted to know why the money was being [497] deposited back in the account again after the check was cashed?

A. Abe Zemansky didn't deposit the money; I did.

Q. You did? A. Yes.

Q. But Abe Zemansky told you that the teller wanted to know why you were doing that?

A. No, he never told me that.

Q. At any rate, other than the first couple of times, you said that Abe Zemansky went by himself to the Union Bank and got the checks cashed, is that right? A. Yes sir.

Q. On all of the times that he cashed the checks, he would turn the money over to you at the office, isn't that right? A. Yes sir.

Q. Sometimes you re-deposited the money and sometimes you would not, is that right?

A. Yes sir.

Q. When you did re-deposit it, it was in the bank account of Jeanette Dienstag, your daughter?

A. Yes sir.

(Testimony of Sam Kleinman.)

Q. And the checks that were made out to Zemansky Brothers were signed by Jeanette Dienstag also?

A. Not by Jeanette; I signed the checks.

Q. You signed them, but in her name? [498]

A. Yes sir, Jeanette Dienstag, S. Kleinman.

Q. Who told you to make out those checks to Zemansky Brothers?

Mr. Miller. Objected to on the ground that it assumes a fact not in evidence, that someone told him.

Mr. Chotiner: Did anybody tell you to do it?

A. Well, I myself and Abe Zemansky were sitting in the office. We had made out a new contract, so Abe Zemansky said to me, "We will have to get busy, we will have to get busy and see whether we can keep that stuff in good shape, so it wouldn't get mixed up." I said "What do you mean by that?" He said "Delivering the company's checks this way and that way; I would like to give you an idea how we should do that." I said "Abe, you can give me an idea but I am no bookkeeper; I don't know how to keep books and I wouldn't even attempt to know how to keep books." He said "I will tell you how we should do that; when we make out a contract, when we give you a contract for a thousand dollars or two thousand dollars, whatever the amount is, let's make out a check and we will keep a checking book account." I said to him "This amount of the loans we have to make over again is quite a lot."

(Testimony of Sam Kleinman.)

I remember something around \$7,000, close to \$8,000. I said "No, I will tell you what I will do. I never figured exactly how much money I got in the bank. I will tell you, Mr. Zemansky, I will go down to the bank and find out just [499] how much money I got." I came back, it didn't take me long, it is right in the same block, and I said "I only got so much money I can make a contract for."

Mr. Chotiner: Keep your voice up.

A. I said "I can only make a contract for so much money." I don't remember exactly how much the contract was, but the contract will prove how much it was. He says "Well, tell you what you do. After we make out this contract we will make out another one, so we will be able to keep track of them." I said "As long as everything is done right, there can't be any objection, I am satisfied." That's the way we did it.

Q. Those contracts were made out for the same amount as the accumulation of redemptions that had taken place and the money had gone into the cash drawer, isn't that true?

A. No, at that time there had been a bunch of pledges lying in a shoe box. The amount of the pledges amounted to around—the figure it is impossible for me to tell unless I can see the contract. That's how much they were. He said "You can make out the whole contract, the whole amount of the pledges we took in for you, we loaned out for you, and we will make one out today, one in a couple of days, until we clean it up."

(Testimony of Sam Kleinman.)

Q. Mr. Kleinman, isn't this what used to happen down there. After the security had been given for the Simons [500] account and the Gans account, isn't this what used to happen? Customers would come in and make redemptions for pledges that had been given to you for security, and a list of those redemptions would be given to you at the end of each day; then every few days you would go over that list and a new contract would be made out for the amount of money that was shown by those redemptions; isn't that correct?

A. Well, my understanding was——

Q. Never mind what your understanding was. Isn't that what used to happen as I have just told it to you?

A. Would you tell it to me again?

Mr. Chotiner: Read the question.

(Question read.)

A. You have reference to the pledges with Simon?

Q. No, I will put it this way to you. Customers would come in to the place of business.

A. Yes.

Q. And make redemptions of pledges that have been given to you for security, isn't that right?

A. Yes.

Q. That money used to go into the cash drawer, isn't that right?

A. Yes sir.

Q. And a list of those redemptions would be given to you at the end of the day? [501]

(Testimony of Sam Kleinman.)

A. Yes sir.

Q. Then every few days you would figure up the amount of those redemptions and a new contract would be made out for that figure, is that right?

A. Yes.

Q. And it was on those occasions that you used to give a check to Zemansky, is that right?

A. When I made out the new contract I used to give him a check, just to show that that substitution was made for a bookkeeping system.

Q. And that money that was represented by that check was turned back to you?

A. Yes, that money.

Q. After you started that system there, or after that system was in operation, there was a change made in the system and the check would be made out for less than the amount of the promissory note, is that true?

A. Less?

Q. Yes. A. Less pledges?

Q. No, after a while down there, a change was made so that the check would be made out for less than the note was made out for and a notation would be put on a piece of paper that the balance was paid in cash?

A. Yes, that was done.

Q. Who told you to do it that way? [502]

A. Abe Zemansky. I told him I didn't have enough money. He said that will be all right so long as we have it on the check that way, it will be my own handwriting and there won't be any dispute about it. [503]

(Testimony of Sam Kleinman.)

By Mr. Chotiner:

Q. Was Abe Zemansky the first person who suggested the changing of the system whereby you made the check out for less than the amount of the promissory notes?

A. Yes, he said to me——

Q. Was he the first one who mentioned that subject? A. Yes.

Mr. Chotiner: No further questions.

Mr. Dienstag: I think Mr. Kleinman might explain that. He started to.

The Witness: I can explain.

Mr. Chotiner: You may explain.

The Witness: He says those checks would merely run between us, between Zemansky Brothers and ourselves, and myself, just merely to show the transaction. He says, "If you give us a check for \$500 and \$300, and the contract will be for \$2,000, I will put it on the bottom of the check in my own handwriting, paid by cash so much, paid by check so much, and balance so much." I said "Anything you think is right, I am satisfied." [507]

SAM KLEINMAN,

the claimant, called as a witness in his own behalf, having been previously sworn, testified as follows:

The Referee: Be seated. You have been sworn.

Direct Examination

Q. Mr. Kleinman, approximately when did you first meet the Zemansky Brothers?

(Testimony of Sam Kleinman.)

A. I met the Zemansky Brothers around in 1912 or 1913. [512]

Q. When did you, first of all, ever loan them any money?

A. I loaned them money, the exact time I can't tell. It is a long time back. It must have been around 1925.

Q. Do you remember how many years after 1925 you loaned them money?

A. Oh, I believe I was doing business with them, loaning them money up until around 1928.

Q. Do you know approximately, Mr. Kleinman, how much money you would loan them from time to time during that period?

A. I used to give them at a time \$10,000, \$15,000 and \$20,000.

Q. Were all of these sums repaid to you?

A. Yes, everything was paid up.

Q. After 1928 they owed you no money, during the year 1929 or 1930?

A. After 1928, I believe, yes.

Q. Did you again loan them any money after 1928? A. 1928 I did, yes sir.

Q. When did you first loan them money after 1928? A. In, I believe, 1933.

Q. Did you loan them money after 1933?

A. Yes.

Q. When did you start to work for them, Mr. Kleinman?

A. I started to work for them around the last part of [513] 1935.

(Testimony of Sam Kleinman.)

Q. Do you recall about when you started to work for them in 1935?

A. When they moved up to the new Provident; that was around in October.

Q. How long did you work for them after October, 1935?

A. I worked for them up until the last week in December in 1938.

Q. During that time, did you loan them money from time to time?

A. You mean after 1938?

Q. Yes. A. Yes sir.

Q. Excuse me; I meant after 1935, Mr. Kleinman? A. Oh, yes, yes, yes sir.

Q. What did you do after you quit their employ the last week in December of 1938?

A. In 1938, I went up—I was taking a rest and went up to San Francisco.

Q. For what purpose did you go to San Francisco?

A. I went up to San Francisco to see my daughter and grandchild.

Q. Is that your only child? A. Yes.

Q. Do you recall how long you remained in San Francisco?

A. I was there oh, I believe, a week. [514]

Q. Did you return to Los Angeles?

A. Yes sir.

Q. After you returned to Los Angeles, did you have any conversation with Sol Zemansky concerning the money that was owing to you?

(Testimony of Sam Kleinman.)

A. I did, yes sir.

Q. And do you recall about when that conversation was had?

A. I was in the office a few days. Sol Zemansky came into my office. We sat down and talked about different things, and he asked me, "How do you like to be without doing anything", and I said, "Well, I like it, I want a good rest." Then we talked a lot about things. Then I said to him, "Sol, let's see, I am no more employed by you." I said, "I would like to get my money secured."

Q. Do you recall what, if anything, he said to that, Mr. Kleinman?

A. He said, "Sure, sure."

Q. Was anything further said at that time?

A. No, that is all.

Q. Did you remain in Los Angeles after that time?

A. Yes, I stayed in Los Angeles.

Q. How long did you stay in Los Angeles.

A. Oh, maybe around a couple of weeks.

Q. Then what did you do?

A. I used to go to San Francisco to see my daughter [515] three times a month, sometimes twice a month.

Q. Did you go up to San Francisco?

A. Yes sir.

Q. While you were in San Francisco, did you have a discussion with Mr. Dienstag?

A. With Mr. Dienstag, yes.

(Testimony of Sam Kleinman.)

Q. Did you come down to Los Angeles after that? A. Yes.

Q. How soon after you had that discussion was it you came down to Los Angeles?

A. With whom?

Q. With Mr. Dienstag.

A. I talked to Mr. Dienstag in San Francisco.

Q. When you returned to Los Angeles, did you come alone or with any other person?

A. Alone.

Q. Do you recall that Mr. Dienstag came to Los Angeles after you did? A. He came after.

Q. How soon after did he come?

A. Oh, around about a week or two weeks, or something like that. [516]

Q. Was a conversation had there at that time between Mr. Zemansky and Mr. Dienstag?

A. Yes.

Q. Do you recall who was present at that time?

A. Mr. Zemansky, Mr. Dienstag and myself.

Q. Do you recall what was said at that time?

A. Mr. Dienstag said to Mr. Sol Zemansky, "Sol, I understand that you want to give Sam Kleinman security for his money;" so he says "Sure, I will I will secure him." So, Eddie, Mr. Dienstag, said "What have you got, what have you got." So Sol Zemansky started to tell him that they were in so many different enterprises, we are in the loan business, we need a lot of money, and the only thing I will give him, if you want, I will give him the loans, the pledges; so when he told him he was

(Testimony of Sam Kleinman.)

going to give him the pledges, Mr. Dienstag says that will be all right. But then Mr. Zemansky said, "Listen, there is something about the pledge business which I would like to give him, [517] it may not be legal; he said that "The law I had put in myself," so they started talking about law points and all that, something about that, and Sol Zemansky said to him "I will tell you what I will do; I will give you one of my Loan Department tickets and the law is printed on the back of the ticket and you look it up. If you look it up and if it is not against the law, I will be glad to do it." So Mr. Dienstag went out with Sol Zemansky from the office and he gave him that pawn-ticket. After he gave him the pawn-ticket, Mr. Dienstag told Sol Zemansky "I have to go back to San Francisco." He said "I will go to San Francisco and look it up, look up the law and see how it could be arranged."

Q. Did Mr. Dienstag return to San Francisco, if you know? A. After, yes.

Q. Did he again come back to Los Angeles, Mr. Dienstag?

A. Yes sir, he came back.

Q. Do you remember how soon he returned to Los Angeles?

A. That was around in February.

Q. And were you present at another conversation at that time between Mr. Zemansky and Mr. Dienstag? A. Yes.

Q. What was that conversation?

(Testimony of Sam Kleinman.)

A. Well, that conversation was, Mr. Dienstag came back and told him, he said "Mr. Zemansky, you are right [518] about the pledges being re-loaned." He said "I looked it up and you are right, but you don't have to give us the pledges. We can make a different contract which would not affect the pledges at all." So they talked some about the legal points about it and everything, and Sol Zemansky said "Mr. Dienstag, anything you do and if it is right I am glad to do it."

Q. Did Mr. Dienstag have some notes with him at that time?

A. He had some yellow paper written down or something, which he read it to Sol Zemansky.

Q. Was there a later conversation, Mr. Kleinman?

A. Yes, there was a later conversation.

Q. Do you recall if Mr. Dienstag had anything with him at that time?

A. The second time?

Q. Yes.

A. Yes, the second time he had a form of a contract.

Q. What color paper was it written on?

A. It was something like this here.

Q. A yellow piece of paper?

A. Yes, a yellow paper and he had it all lined out, how it could be done, and he talked to Mr. Zemansky and Mr. Zemansky took it and read it, and after he got through reading it Sol Zemansky

(Testimony of Sam Kleinman.)

said to him, "I think that is just fine; I am glad to know that, that it could be made that [519] way and I think that I can take that same contract and go to any bank and get money on it."

Q. Do you remember any discussion at that time concerning some notes in the name of Golob?

A. Max Golob.

Q. Do you remember what the discussion was in regard to the Golob note?

A. Yes sir. After Mr. Dienstag talked with Mr. Zemansky about the contract and everything, Mr. Dienstag said to him, "Now listen, Sol, I am going to draw that contract, I want you to tell me all the conditions and the different ways you did business with Mr. Kleinman." He said "I understand that he had notes at twelve per cent, had notes at ten per cent, and Mr. Zemansky said "Mr. Dienstag, I wouldn't worry about that, you know we are not so particular one way or the other with Mr. Kleinman. He has given us a lot of money off and on, and furthermore, there is no usury, there is no usury, and the last man in the world I would ever do any harm to is Mr. Kleinman, and I am the one to know what usury is, because I was the one who killed the usury." So Mr. Dienstag said, "Well, I don't know about that; I know that there is usury, and if I make out that contract, if I make out that contract," he says, "I want you to tell me if you did pay him any usury, if you did pay him, do you waive it." He said, "One hundred per cent; I have no claim against him." [520]

(Testimony of Sam Kleinman.)

Mr. Wolver: Q. Do you recall a conversation being had in your presence between Mr. Sol Zemansky and Mr. Kravitz about picking out pledges that evening?

A. Well, after Sol Zemansky was satisfied with the contract, we left my office and went into Joe Zemansky's office, Mr. Zemansky and Mr. Dienstag, and he called out, he said, "Mr. Kravitz"—he called him Leo; he said "Leo, I want you to go and pick out \$100,000 worth of pledges to be placed in Mr. Kleinman's loan."

Q. Was a different contract prepared by Mr. Dienstag, was a white copy of the contract, a finished [521] copy, prepared by Mr. Dienstag?

A. A white copy was prepared by Mr. Dienstag, yes sir.

Q. Do you remember when you signed those copies; I don't mean the date, but do you remember signing those copies? A. Yes sir.

Q. How many copies did you sign?

A. I signed two copies.

Q. Do you recall how long before you signed these copies it was that this conversation was had when Mr. Kravitz was told to pick out the pledges?

A. It was the next day.

Q. After you signed the copies you gave them to Mr. Dienstag, didn't you? A. Yes.

Q. Both copies?

A. Both copies, yes sir.

Q. Do you know if Mr. Dienstag went to San Francisco that night?

(Testimony of Sam Kleinman.)

A. Mr. Dienstag wanted Sol Zemansky to sign it and Sol Zemansky, he was told by Abe Zemansky, that he left for San Francisco. Mr. Dienstag says "That's a nice way to do after me working so hard and I find out now that he is going to leave." He said "Sol went away in an awful hurry, but he will be back in a day or so;" so Mr. Dienstag said that he has to be in San Francisco himself; so he left that night. [522]

Q. Now, do you recall when—you are acquainted with the pledge tickets, aren't you, the stubs?

A. Yes sir.

Q. Do you recall whether or not Abe Zemansky picked out the stubs corresponding to the pledge tickets?

A. Yes sir.

Q. Do you remember when he picked those out, Mr. Kleinman?

A. Well, he picked them out, I think he picked them out about the second day; he started to pick them out right away, you know, but he could not finish them; it took him quite a while to finish them, about the next day.

Q. Do you remember when they were picked out what he did with those pledge tickets?

A. He put them in a separate book like the other pledge books are.

Q. Was any mark put on those books?

A. Yes, he had them in a pledge book like the other pledge books are, and he took a pencil and copied a mark on the pledge tickets, like this is the pledge ticket, with a letter capital K.

(Testimony of Sam Kleinman.)

Q. That was on the back of the book?

A. Not on the back, on the pledge book, I mean like this.

Q. On the edges of the pledge book?

A. Yes. [523]

Q. Did he ever give those books to you?

A. When he had them picked out?

Q. Yes.

A. I understood the contract had to be signed and I had to sign for having received the pledge tickets so I went to Mr. Horn when they were all ready and Mr. Horn came out with those two contracts.

Q. Were they white pieces of paper, Mr. Kleinman? A. Yes, white pieces.

Q. What was done with them?

A. Well, Mr. Horn says, "Have you got the pledge books?" I said, "Yes, they are right here." We went in Abe Zemansky's office and Abe Zemansky was there, and he asked me to sign the contract, that I received the pledge tickets. After I signed for the pledge tickets, he asked Abe Zemansky to sign the other one.

Q. Where were the pledge books at the time these were signed?

A. In Abe Zemansky's office.

Q. They were right there on the desk?

A. Yes.

Q. And you signed it first and then he signed it?

A. Then Abe Zemansky signed.

(Testimony of Sam Kleinman.)

Q. Did you remain in Los Angeles after that?

A. No, I believe, I remember real sure the same night [524] I went to San Francisco.

Q. Mr. Kleinman, do you recall having a telephone conversation while you were in San Francisco with Sol Zemansky in Los Angeles?

A. Yes, I believe it was about two days after I was there.

Q. And do you recall relating that telephone conversation to Mr. Chotiner, you told Mr. Chotiner?

A. Yes sir.

Q. Pursuant to that telephone conversation, you [525] returned to Los Angeles?

A. Yes sir, the next day, the next morning.

Q. Do you recall whether or not, Mr. Kleinman, while you were in San Francisco, you saw a copy of the contract signed by Sol Zemansky?

A. Yes sir. Mr. Dienstag had it in his office.

Q. And do you know the signature of Sol Zemansky? A. Oh, yes.

Q. Is that his signature? A. Absolutely.

Q. I believe you also told Mr. Chotiner that Mr. [526] Dienstag was requested by Judge Pacht to come there the following morning and assist a Mr. Ross of Judge Pacht's office in the drawing of the contract? A. Yes sir.

Q. Do you recall that Mr. Dienstag came back to the office after that occurred?

A. After the conversation?

(Testimony of Sam Kleinman.)

Q. After he had been with Mr. Ross?

A. Yes, he came back. I believe he was several times in the office.

Q. Do you recall a conversation had between him and Sol Zemansky concerning this contract that Mr. Ross was preparing for the Simons?

A. Yes sir, he said "Well, Mr. Zemansky, the contract is all made up; all you have to do is just give the pledge numbers and Judge Pacht's office will put them in the contract, and I am leaving to-night." That is, I believe Mr. Dienstag said he wanted to leave about the 8:00 o'clock train, so Mr. Zemansky says, "Eddie, can't you do me a favor and stay right here until I clean up the whole contract" he said, "Sol, I would like to do it for you, but on account of my interests I have got to be in San Francisco, I have got to be there." He says "How about staying and fixing it up with me and take the airplane, to go back home." Eddie didn't like it because he never went in an airplane, so it looked funny to me and when he [527] said that I said to him myself "Eddie, you never tried it, try it once." Then he went to Mr. Leo Kravitz to pick out the pledges and Kravitz said "I can't do it so quick; it is late now for dinner," like that, so Sol says to me "Sam, to save a lot of time, to save a lot of time can't you do this for me; can't you let me pick out a certain amount of pledges from your pledges and make out the numbers and give them to Judge Pacht, and then we will pick out others for you

(Testimony of Sam Kleinman.)

right away, which we will have a lot more time to do, and Mr. Dienstag will be there, he will be able to go home." I turned around and I looked at Mr. Dienstag and I said "Eddie, what do you think about it"; he said "Well, I don't see any harm in that if he gives you other pledges for it." I agreed to it, and Sol Zemansky said "You know, Sam, while you were away those few days we collected close to \$4,000 on your pledges, while you were away which I have the ticket for, the slips for every day, every time merchandise is delivered to the customers."

Q. You mean the daily report?

A. The daily report. And he said "How about letting us re-loan that money from you." I promised them I would go and stay with them a few months more to help them out. He said "You promised you will stay with us a little longer; we will be busy and you know we would like to have you with us a little longer since you know about doing [528] that." I looked at Eddie again and Mr. Dienstag said "Well, I will tell you, Mr. Zemansky, if you want to take Mr. Kleinman's pledges that come in, the money that comes in from his pledges, I want it understood that all pledges coming in in this office belong to Mr. Kleinman and the money he loans for the pledges." So he said "How about picking new pledges for that \$4,000 and putting it in a contract." I said "That will be all right." So that new contract was changed for around \$4,000.

Q. Was there anything said at that time, Mr.

(Testimony of Sam Kleinman.)

Kleinman, in regard to what use the money that came in on your redemptions could be put?

A. To loan out on new pledges, and I understand Mr. Dienstag gave him to understand at that time, and he told him right in front of me, he says "Sol, I want every dime and every dollar that belongs to Mr. Kleinman loaned out, but I want every pledge that comes in to belong to Mr. Kleinman."

Q. Do you recall Mr. Dave Zemansky being present at all?

A. Yes, that night, on that night, when they signed Mr. Simon's contract; Sol Zemansky was there, Abe Zemansky and Dave Zemansky all three of them, because they had to sign that contract. Simon didn't want to leave the place until they signed the contract, wanted to take the contract along with them. So Dave Zemansky says, "Sam, as you are willing to let us re-loan your money, how about giving [529] us some fresh money." He said that to me and to Mr. Dienstag, he talked with me and Mr. Dienstag talked to me, Mr. Dienstag said "It is not my money, whatever Mr. Kleinman agrees, if you do it like I told you to, with his money, I think you can do it."

Q. Did Mr. Sol Zemansky or Dave Zemansky say they would?

A. Oh yes, they were all there together, all three of them.

Q. Did you have the other pledges picked out, or did Mr. Kravitz pick out the pledges the next day for you?

(Testimony of Sam Kleinman.)

A. You mean for the exchange of the Simon's?

Q. Yes.

A. I believe he started that same night, after he was through picking out my pledges, but he hadn't finished it up until the next day.

Q. Then you signed the contract on the next day?

A. Yes, I believe it was the next day, the next day or the day after; it was right away.

Q. After that, did you receive these slips showing what redemptions had been made the day before on your pledges?

A. Yes sir.

Q. And you kept track of those slips?

A. Yes.

Q. Did you ever add them up, Mr. Kleinman? [530]

A. Yes sir.

Q. How did you add them up?

A. Well, if I had one I wouldn't add it up, I could just see it was about \$500 or \$600, but when I had a few redemptions I used to go in Joe Zeman-sky's office, he had an office there, and they had an adding machine and then I would add them up.

Q. Did you ever see what was being done with the money that came in on your pledges?

A. When a customer came in and took the pledges, other ones put pledges in.

Q. Was any record kept of the loans that were made there daily?

A. Oh, yes.

Q. In what book was that, do you recall?

(Testimony of Sam Kleinman.)

A. You mean for the whole business?

Q. Yes.

A. They made out a sheet every day, how much pledges went out and how many pledges they took in.

Q. Did you ever look at that sheet?

A. I didn't look at that sheet down there, because I wouldn't understand it, but I seen pledge tickets where they delivered for mine, my pledge tickets. My pledge tickets had the initial "K", every pledge ticket had the initial "K", knowing that that pledge ticket was for merchandise put away for me. [531]

Q. Did you ever go into the vault after March 1st? A. No sir.

Q. Did you see where they were keeping the pledges that came in after March 1st?

A. They kept them in a lot of shoe boxes.

Q. Did you see any marking on those boxes?

A. They had a lot of shoe boxes and the pledges were in there, and then on the top of the shoe box was a piece of paper where they used to describe on the paper with a letter "K".

Q. Did you ever discuss that with any person, why they were kept in shoe boxes.

A. No. I knew it was kept for me.

Q. Did anyone tell you that? [532]

A. Well, I knew it, Kravitz always made the remark to me.

Q. What did Mr. Kravitz say?

(Testimony of Sam Kleinman.)

A. Mr. Kravitz says, "When are you going to book that stuff for yourself; you know that belongs to you." [533]

Q. The second one is the 2nd day of March, 1939, which we have discussed as the contract relating to the Simon contract. The next one is on the 22nd day of March, 1939; do you recall when that contract was made and entered into, do you recall making the contract about that time?

A. Yes, surely.

Q. Do you recall it was in the sum of \$2,150?

A. Yes.

Q. Prior to the making of that contract, did you have any conversation with any of the Zemansky boys?

A. Yes, I talked to Abe Zemansky about that.

Q. All right. About when did you talk to Abe Zemansky?

A. Just before I started to make that contract.

Q. Who was present at that time?

A. Just me and him.

Q. And what was said? [534]

A. Well, Abe says, "We are going to have a lot of contracts here to sign, the way the goods goes out and comes in." He said, "We have to have some system about it." I said, "Do you know of any system which we can have?" He said, "I am going to have a book where I am going to stamp the pledges with the seal, and if you are going to make out any contracts like for around \$7,000 or \$8,000, why not

(Testimony of Sam Kleinman.)

give us a check and we will run a checking system.” That sounded pretty good to me, that checking system. I said, “Abe, I don’t think I got that kind of money in the bank; I will run down and find out how much I have.” I came back and told him about the amount of money I can put out and he said, “Well, you don’t have to have it on one contract; you make a contract today and in a couple of days later you make another one.”

Q. Do you recall how much money you told him you could pay out?

A. Well, I told him the first contract was \$2500 and the pledges amounted to \$2510.

Q. Is that why the contract was made out in the sum of \$2510? A. Yes.

Q. Was anything credited on the old notes at that time? A. Yes.

Q. How much?

A. Now, you see, the idea was, that’s why he brought [535] that out, that’s what the real idea was for him to bring that out to me. He said, “I will give you new contracts, new notes, and you can have the old notes.” He said, “That’s the only way I can see to do; we are going to give you new notes and you mark one of the notes, on the old notes, how much credit you give us.” So I wrote, after we made that new contract so much money I wrote out on the back of the old note, credited so much. [536]

A. The 5th day of April, 1939, this was a contract, which I made quite a few of them, that was

(Testimony of Sam Kleinman.)

an exchange of pledges for the Gans transaction.

Q. Do you remember when the Gans transaction was first discussed with you?

A. That was talked to me about a couple of days before.

Q. Did you have any conversation with any person?
A. Sol Zemanksy came in my office.

Q. What was said?

A. He said to me, "Sam you know we owe a little money to Bob Gans." I was surprised, I never knew they owed him any money; so I said, "You owe him money, too?" So he said, "We don't owe him much, but he is a good friend of Simon, Bill Simon," and he came up and asked me if I would not do the same thing as we did with the Simons. So he said, "You see, the pledges we have right now on hand are redeemable very fast, pledges that we have coming in. I would like to exchange pledges with you and give him pledges that don't go out so fast." [538]

Q. Which ones were the ones that would go out so fast, Mr. Kleinman, were they older pledges?

A. Older pledges, old pledges.

Q. Which ones were the ones that didn't go out so fast, new pledges?

A. New pledges, just put in.

Q. What did you say to that?

A. I said, "Well, I don't think there is anything wrong about that," and I let him do it.

Q. And you made the exchange?

(Testimony of Sam Kleinman.)

A. I made the exchange.

Q. Do you remember when your pledges were picked out again?

A. My pledges were picked out, I believe, the same day.

Q. The same day you had this conversation?

A. Yes, the conversation.

Q. Do you remember when the Gans contract was signed? A. No.

Q. Your pledges you started to pick out on the same day? A. Yes.

Q. Do you remember how many pledges were transferred to the Gans account?

A. I believe over \$12,000.

Q. And did you receive the same number of pledges? [539] A. Yes sir.

Q. Was all of this handled by this checking method?

A. Yes, the same way, the same way.

Q. And the amount of your contract was limited by the amount of the check that you could draw from time to time? A. Absolutely.

Q. And so you would make a contract in proportion to the amount of money that you could draw out?

A. Yes, make a new one, make a new one.

Q. Until all of the money that was coming to you was taken care of by contract? A. Yes.

Q. During all of this time, did they continue to have these boxes, and so on?

(Testimony of Sam Kleinman.)

A. All the time.

Q. They always had a "K" on them?

A. Yes sir.

Q. You saw them? A. Yes sir.

Q. I understand, Mr. Kleinman, that on the day that you had this conversation, that you would give them certain pledges, newer pledges to be given to Gans, they started to pick out pledges to replace those? A. To replace mine.

Q. And they were also put in paper bags, and marked "K"? [540]

A. Yes, marked "K," kept them right there until I made out the contract.

Q. Who did that?

A. Leo Kravitz, he was the only one that always done that.

Mr. Wolver: Mr. Laugharn, I understand the books of Zemansky Brothers indicate, and I ask for a stipulation, that Mr. Kleinman received no salary between the last week in December and the first week in March, 1939. I believe Mr. Young and Mr. Yates can verify that for you gentlemen.

Mr. Chotiner: You want us to stipulate that he received no salary during that period?

Mr. Wolver: Yes, I believe Mr. Young and Mr. Yates can verify that.

Mr. Laugharn: He certainly could testify what the fact was. I don't think you need our stipulation, do you?

Mr. Wolver: As to what the record will show. There has been some question as to what the record showed.

(Testimony of Sam Kleinman.)

Mr. Laugharn: Who examined the record?

Mr. Wolver: I believe Mr. Young and Mr. Yates both did. It should save some of the Court's time rather than [541] introduce lengthy records.

Mr. Laugharn: Here is the effect of what they are stipulating. They have inspected the books and the last check in 1938 was December 24, 1938, \$74.25, and the first check in 1939 was March 11, 1939, \$49. That's what the record shows.

Mr. Wolver: May we have that so stipulated?

Mr. Laugharn: So stipulated on our part. [542]

Q. By Mr. Wolver: Mr. Kleinman, I show you five white sheets of paper with pencil writing thereon. Have you ever seen those sheets before?

A. Yes sir.

Q. Do you know what they are?

A. Those are pledges picked out for me.

Q. Isn't this in the Gans transaction?

A. On the Gans transaction.

Q. Were these picked out in one day?

A. Those were picked out in one day.

Q. Was this given to you in one day?

A. Yes sir.

Q. Was it given to you the same day you had this transaction? A. Yes sir.

Q. Calling your attention to the columns, there are four columns on the page. Does the first column indicate [544] the pledge number?

The Referee: I think that is obvious, Mr. Wolver; you don't need to ask this witness that.

(Testimony of Sam Kleinman.)

Certainly, in this record that is clear. There is the number and the amount referred to.

Mr. Wolver: As long as the Court is satisfied it is in the record.

The Referee: I don't think anybody can be confused on that in this record.

Mr. Wolver: I will offer this in evidence as Kleinman's Exhibit next in order.

Mr. Chotiner: Objected to on the ground that it is immaterial. It does not do any more than indicate the record.

The Referee: Overruled. This will be Kleinman's Exhibit 8.

KLEINMAN'S EXHIBIT No. 8

KLEINMAN G-1

			1262.50
102.....	20.	11427.....	35.
217.....	25.	11515.....	25.
677.....	25.	11831.....	25.
745.....	30.	11913.....	20.
1092.....	30.	12210.....	25.
1378.....	25.	12229.....	45.
1480.....	30.	12570.....	45.
1685.....	30.	12682.....	40.
1886.....	20.	12909.....	20.
2719.....	40.	12925.....	40.
2868.....	20.	12936.....	30.
3082.....	40.	13014.....	45.
3146.....	40.	13032.....	35.
4204.....	20.	13154.....	20.
4243.....	20.	13260.....	25.
4487.....	25.	13606.....	20.

(Testimony of Sam Kleinman.)

Kleinman G 1—(Continued)

4524.....	25.	13679.....	20.
4727.....	40.	13797.....	40.
4756.....	35.	13806.....	35.
4923.....	20.	14033.....	20.
5193.....	40.	14148.....	20.
5251.....	30.	14190.....	20.
5583.....	25.	14219.....	20.
5678.....	25.	14232.....	20.
5745.....	25.	14238.....	20.
6407.....	25.	14317.....	25.
6681.....	20.	14411.....	30.
6778.....	27.50	14684.....	20.
6878.....	40.	14694.....	20.
7142.....	35.	14792.....	20.
7231.....	25.	14800.....	30.
7355.....	30.	15061.....	20.
7454.....	20.	15117.....	30.
8150.....	25.	15096.....	25.
8162.....	25.	15126.....	20.
9007.....	25.	15191.....	25.
9558.....	20.	15257.....	30.
9586.....	25.	15365.....	40.
9640.....	20.	15562.....	25.
9782.....	35.	15641.....	20.
10385.....	20.	15849.....	20.
10607.....	25.	15877.....	20.
10677.....	20.	15885.....	25.
10696.....	35.	15897.....	20.
10883.....	20.	15990.....	30.
10923.....	20.	16094.....	20.
11205.....	20.	16117.....	20.

1262.50

2507.50

(Testimony of Sam Kleinman.)

KLEINMAN H 1

			1230.
16129.....	35.	21141.....	25.
16132.....	20.	21207.....	20.
16306.....	25.	21232.....	20.
16322.....	20.	21307.....	25.
16343.....	25.	21396.....	30.
16366.....	20.	21526.....	25.
16445.....	20.	21699.....	30.
16609.....	25.	21736.....	40.
16714.....	35.	21886.....	35.
16907.....	20.	22011.....	20.
16925.....	20.	22138.....	20.
17169.....	20.	22437.....	45.
17276.....	30.	22444.....	20.
17531.....	40.	22448.....	25.
17539.....	25.	22522.....	40.
17614.....	25.	22554.....	25.
17642.....	20.	22564.....	20.
17742.....	20.	22740.....	30.
17798.....	40.	22792.....	35.
17819.....	20.	22810.....	20.
17826.....	30.	22899.....	25.
18258.....	40.	22919.....	20.
18378.....	25.	22979.....	40.
18399.....	30.	23078.....	20.
18400.....	20.	23090.....	35.
18401.....	25.	23152.....	40.
18424.....	20.	23190.....	25.
18435.....	20.	23241.....	35.
18928.....	30.	23579.....	25.
19046.....	45.	23637.....	35.
19321.....	20.	23654.....	35.
19333.....	20.	23693.....	20.
19478.....	40.	23760.....	30.
19586.....	20.	23772.....	20.
19628.....	30.	23780.....	45.
19817.....	25.	23830.....	25.
19847.....	20.	23840.....	35.

(Testimony of Sam Kleinman.)

Kleinman H 1—(Continued)

19878.....	25.	23898.....	30.
20017.....	30.	23986.....	40.
20172.....	20.	23295.....	20.
20244.....	20.	23327.....	35.
20348.....	30.	24058.....	20.
20509.....	20.	24075.....	25.
20568.....	30.	24205.....	30.
20830.....	30.	24228.....	25.
21073.....	40.	24331.....	30.
21077.....	20.	24457.....	30.
<hr/>		<hr/>	
1230.00		2575.	

KLEINMAN J 1

		1307.00	
29035.....	40.	30719.....	20.
29044.....	25.	30748.....	25.
29070.....	25.	30752.....	20.
29089.....	35.	30872.....	40.
29128.....	20.	30966.....	25.
29133.....	40.	31003.....	20.
29155.....	20.	31022.....	20.
29172.....	45.	31040.....	20.
29198.....	20.	31081.....	20.
29233.....	30.	31136.....	25.
29251.....	30.	31141.....	25.
29313.....	20.	31145.....	40.
29318.....	20.	31155.....	20.
29347.....	20.	31156.....	30.
29384.....	30.	31186.....	20.
29451.....	20.	31188.....	35.
29462.....	40.	31227.....	30.
29468.....	20.	31234.....	40.
29547.....	35.	31261.....	40.
29567.....	20.	31292.....	20.
29570.....	40.	31298.....	40.
29580.....	30.	31314.....	30.

(Testimony of Sam Kleinman.)

Kleinman J 1—(Continued)

29583.....	20.	31330.....	20.
29597.....	30.	31362.....	30.
29606.....	47.	31366.....	25.
29632.....	40.	31373.....	25.
29789.....	30.	31392.....	30.
29767.....	25.	31446.....	25.
29797.....	20.	31504.....	40.
29920.....	35.	31510.....	40.
30202.....	35.	31647.....	20.
30208.....	20.	31674.....	35.
30216.....	20.	31688.....	20.
30374.....	20.	31705.....	20.
30409.....	20.	31728.....	25.
30429.....	20.	31772.....	35.
30456.....	20.	31785.....	27.
30461.....	25.	31806.....	35.
30494.....	30.	31812.....	20.
30506.....	20.	31869.....	35.
30582.....	35.	31901.....	40.
30594.....	20.	31965.....	30.
30609.....	30.	31976.....	25.
30662.....	30.	31979.....	20.
30683.....	40.	32039.....	20.
30688.....	25.	32159.....	30.
30690.....	25.	32171.....	30.

1307.00

Total 2614.

KLEINMAN I 1

		1195.
24488.....	30.	26995..... 25.
24593.....	25.	27056..... 25.
24610.....	20.	27123..... 30.
24636.....	20.	27041..... 30.
24648.....	20.	27127..... 25.
24661.....	20.	27131..... 30.
24786.....	30.	27141..... 85.

(Testimony of Sam Kleinman.)

Kleinman I 1—(Continued)

24844.....	40.	27143.....	20.
24868.....	25.	27204.....	20.
24915.....	25.	27284.....	25.
24917.....	20.	27358.....	40.
24949.....	20.	27492.....	20.
25165.....	20.	27604.....	35.
25209.....	25.	27605.....	20.
24912.....	25.	27613.....	30.
25497.....	20.	27622.....	35.
25254.....	30.	27692.....	20.
25563.....	35.	27725.....	20.
25597.....	30.	27744.....	40.
25661.....	30.	27755.....	35.
25698.....	20.	27764.....	20.
25771.....	20.	27902.....	40.
25847.....	40.	27928.....	35.
25854.....	35.	28023.....	40.
25897.....	20.	28048.....	20.
25969.....	25.	28135.....	20.
25984.....	25.	28140.....	35.
25989.....	25.	28144.....	30.
26055.....	30.	28186.....	25.
26089.....	20.	28247.....	25.
26094.....	35.	28261.....	20.
26122.....	20.	28282.....	25.
26234.....	30.	28289.....	25.
26400.....	20.	28307.....	30.
26408.....	45.	28309.....	30.
26424.....	20.	28317.....	35.
26482.....	20.	28408.....	30.
26515.....	40.	28424.....	20.
26597.....	20.	28471.....	20.
26767.....	25.	28517.....	20.
26912.....	25.	28524.....	35.
26915.....	30.	28540.....	45.
26952.....	25.	28607.....	20.
26977.....	25.	28638.....	20.

(Testimony of Sam Kleinman.)

Kleinman I 1—(Continued)

26985.....	20.	28780.....	30.
26986.....	25.	28814.....	20.
		28932.....	30.
<hr/>		<hr/>	
1195.00		2500.	

KLEINMAN K 1

Ford. 1505.00

32174.....	30.	33235.....	30.
32223.....	25.	33250.....	30.
32231.....	30.	33262.....	25.
32256.....	30.	33274.....	30.
32305.....	20.	33301.....	25.
32318.....	25.	33312.....	22.50
32340.....	30.	33336.....	35.
32342.....	20.	33341.....	25.
32353.....	35.	33384.....	40.
32364.....	40.	33388.....	25.
32408.....	45.	33406.....	35.
32459.....	20.	33423.....	30.
32464.....	25.	33461.....	20.
32491.....	20.	33510.....	35.
32496.....	35.	33516.....	40.
32552.....	40.	33530.....	25.
32560.....	20.	33539.....	20.
32562.....	25.	33540.....	35.
32643.....	30.	33544.....	40.
32655.....	25.	33587.....	20.
32668.....	25.	33592.....	35.
32689.....	35.	33613.....	20.
32734.....	20.	33652.....	40.
32792.....	25.	33677.....	20.
32796.....	20.	33690.....	30.
32826.....	35.	33717.....	20.
32848.....	200.	33777.....	35.
32858.....	25.	33813.....	35.
32861.....	20.	33861.....	35.

(Testimony of Sam Kleinman.)

Kleinman K 1—(Continued)

32881.....	20.	33872.....	40.
32895.....	20.	33876.....	20.
32975.....	20.	33884.....	40.
32991.....	20.	33907.....	25.
33050.....	20.	33918.....	20.
33062.....	20.	33924.....	20.
33067.....	35.	33928.....	25.
33090.....	25.	33986.....	37.50
33108.....	35.		
			<hr/>
			2590.
33155.....	35.		
33166.....	35.		
33173.....	40.		
33201.....	25.		
33215.....	20.		
33218.....	35.		
33224.....	20.		
33225.....	40.		
			<hr/>
			1505.00

[Endorsed]: Filed Aug. 26, 1940.

Mr. Wolver: May we have that ledger sheet, your Honor?

The Referee: Yes.

Q. By Mr. Wolver: I am calling your attention to Trustee's Exhibit No. 6, Kleinman's Exhibit 6, calling your attention to June 2nd, when a contract in the sum of \$3,750 was made, and call your attention that no credit was made on that same date upon the old note as shown by this exhibit; does that recall anything to your mind?

(Testimony of Sam Kleinman.)

A. Yes sir, I remember that.

Q. What was that?

A. The \$3,750, that was money they owed me in I.O.U.'s [545] and I gave them more money and made out a contract for it.

Q. The I.O.U.'s represented other money?

A. Other money I gave them.

Q. Was that given to them after March 2nd?

A. After March 2nd, yes.

Q. And at the same time you gave them additional money?

A. Additional money and made out a contract for that much.

Q. Calling your attention to the contract of July 5th in the sum of \$2400.

A. July 5th, that is, as I remember, that was the last contract I made with them. On July 5th Dave Zemansky came up to the office and he said, "Sam, I think it is time to pay you the interest," and he gave me \$2400 in \$100 bills and I gave him a receipt, "Paid interest, \$2400, S. Kleinman," and he took it and I took the money and put it in a drawer in my desk where I always kept my money. Mr. Zemansky left my office and went in the other office to talk with Sol and everybody else there, like he usually does, and it was around about in the afternoon he comes back to me and he says, "Sam," like he always would call me by my first name, "Sam, do you need that money that I just paid you this morning?" I said, "Well, I don't really need

(Testimony of Sam Kleinman.)

it pretty bad right now, but I might need it.” He [546] said, “Could you let us have it; we will give you pledges for it and a contract for it.” I said, “I will make a contract with you for it, but I haven’t got any contract, I will have to go and have one made.” So I had a copy that Mr. Dienstag left with me and I took that copy up to the stenographer in the same building, the stenographer for the building in the building upstairs, I believe it was on the ninth floor, somewhere around there, the ninth floor in the same building, and I gave her that copy that Mr. Dienstag had given me, I didn’t want to use it, and I told her to copy me a contract exactly as this one and in the meantime Leo picked out the pledges; by the next day I had everything ready and Mr. Dave Zemansky came up and I made them all sign and I gave him back the identical money he gave me.

Q. By Mr. Wolver: Mr. Kleinman, during the time you were employed at Zemansky Brothers, did you ever hear any discussions occurring there of other interests?

A. I never talked to anybody and I never had much time to discuss with the employees down there about any of the Zemansky business.

Q. Did you know that they were engaged in other enterprises other than pawnshops?

A. Yes sir.

Q. Did you ever discuss with any person their estate in [547] Reno?

(Testimony of Sam Kleinman.)

A. Well, that was known around the office to everybody, the business in Reno.

Q. Did you ever discuss that with any of the Zemansky boys?

A. The time when they fixed that place up, the time when they fixed that place up, Sol Zemansky said, "This is going to be a gold mine."

Q. Did he ever discuss with you whether or not he was making money on that place after that?

A. Yes, he said they are making money.

Q. What period of time did he tell you they were making good money in Reno?

A. Oh, right along, even the last month or so before they closed up the place.

Q. That would be in June of 1939, he said they were making good money in Reno?

A. Yes, they were making money.

Q. Did he ever discuss with you El Cerritos, that is the 333 Club?

A. I tell you, I don't remember it by the name, but I know just about where it was, yes.

Q. This would be in Oakland, is that right?

A. In Oakland. I was out to that place myself.

Q. Did he say anything to you about that place?

A. He said the first month we opened we got out our [548] money out of it, now, it is clear.

Q. Did he ever discuss with you the Play House in Butte, Montana?

A. I understood they had one down there, but I don't remember if he did or not.

Q. Going back to this place in Oakland, did he

(Testimony of Sam Kleinman.)

discuss with you after you were there, did he ever tell you how much they were making there?

A. I was there, I believe, with Mr. Dienstag, when I was in San Francisco. Mr. Dienstag drove me out there.

Q. Did he ever tell you how much he was making there?

A. He said business was very, very good.

Q. Over what period of time did he discuss that with you?

A. Oh, it is hard to tell, you know, I never asked him too much about his personal business. When he told me I just listened to it.

Q. Over what period of time did he discuss the Play House in Butte, Montana, with you?

A. He told me that that place is doing pretty good, I think it will do just as good as in Reno.

Q. He told you that Reno was making a lot of money?

A. A lot of money, yes.

Q. Did he ever discuss the Redondo property with you, his Redondo property?

A. Yes, when I was out driving with him, he wanted to [549] go to Ocean Park and from there he drove down to Redondo, and from Redondo he wanted to go down to Seal Beach, wanted to look at some property there and I was with him, you know, and he said to me at Redondo, "You see that piece of property right there, we bought it from the Southern Pacific."

(Testimony of Sam Kleinman.)

Q. Did he tell you how much money he was making? A. Oh, yes.

Q. He was making from that property?

A. He said that property paid right off real good, the minute he bought it.

Q. Over what period of time did he discuss with you the Redondo property?

A. Not many times.

Q. Was it after January of 1939?

A. Oh, right along, yes.

Q. Was it after March of 1939?

A. He used to come in my office and talk until about the last month before they closed up.

Q. And he continuously told you he was making good money on all these properties?

A. On all these properties.

Q. Did he ever discuss with you the Palace of Amusement Enterprise?

A. I will tell you, they had so many places I don't remember exactly every one of them. [550]

Q. Do you remember the Neptune at Long Beach?

A. Yes, I remember that one.

Q. Did he ever tell you anything about the Neptune? A. I was there with him.

Q. About when were you there with him?

A. I was there with him, I believe, I don't remember, it must have been around 1937 when I was there with him.

Q. Did he tell you what he was doing there then?

(Testimony of Sam Kleinman.)

A. He said they are doing pretty good.

Mr. Chotiner: Was that in 1937 you are referring to?

Mr. Wolver: Yes.

Q. Did he discuss that Palace of Amusement with you after 1937?

A. I believe after that he told me, or Abe told me, they closed that up, they got their money out of it, made a profit and closed it up.

Q. Do you remember discussing with him the Bay Shore property?

A. The Bay Shore property?

Q. Yes.

A. I believe I saw the Bay Shore property, but they didn't run it when I saw it.

Q. Did he ever tell you they made money there?

A. Oh, yes, he said they made money on that, made more money down there than any other place except Reno.

Q. How late did he tell you that? [551]

A. Bay Shore? Bay Shore was pretty early. I don't believe in was in 1938.

Q. It was before 1938? A. Yes.

Q. He told you they made plenty of money?

A. Yes, he always made money in that place.

Q. Did he ever discuss with you the Boulevard at Belmont Shores? A. No.

Q. Did you ever discuss with him any property out in Glendale?

A. Yes, I knew all the time.

(Testimony of Sam Kleinman.)

Q. What did he say about that?

A. He said, "We have a fine piece of property down there." He said, "It cost us \$125,000, and we will put up a building there," what do you call it for boxing?

Q. An arena. A. No, no.

Q. Ring?

A. A boxing ring in Glendale.

Q. Did he say how much that property was worth?

A. He told me that cost them \$125,000.

Q. Now, on February 24th, did you know whether or not he owed money to any other person?

A. No sir, no sir.

Q. Did you know whether he owed any money to any members [552] of the family?

A. Yes, he did. He didn't tell me if he owed them any money, but at that time I remember he said to me, because I am going to loan the next loan, I can't tell just the date when it was, about two or three days before I made the loan to them, he said, "Sam, you see, my sister has got lots of money in the bank and she is getting very little interest." I didn't answer him anything on that, you know, but he said, "I am not so hot to do business with my sister." I said, "Sol, I got lots of money right now on my hands; you owe me a few thousand dollars in I.O.U.'s and I got extra cash; I can let you have some money for less interest if you want to." He said, "How much less will you charge

(Testimony of Sam Kleinman.)

me?" I said, "I will give you some money at less interest, I will let you have money at seven per cent." So he said, "I will let you know." About a week or two weeks later, he came in my office and he said, "Sam, have you still got that money you say you can let me have at seven per cent?" I said, "Yes." He said, "If you make out the I.O.U.'s and give us the balance in cash, we will make you out a note."

Q. Is that the money that appears here at seven per cent?

A. Yes, exactly.

Q. Outside of Mrs. Harris, did you know that Zemansky Brothers owed money to any other person? [553]

A. I did not, but I always figure any legitimate business owes a little money here and there, you know, but I didn't know they owed anybody any big money.

Q. Do you know, Mr. Kleinman, whether or not Mr. Zemansky did loan any money from Mr. Zemansky's sister, Mrs. Harris? A. No, no.

Q. Outside of this discussion you had where he said his sister had money available for him, you didn't know if he loaned any other money?

A. No, I never even questioned him about it.

Q. From time to time, Mr. Kleinman, you loaned money to Zemanskys on I.O.U.'s?

A. Yes sir.

Q. This would amount to considerable sums, wouldn't it? A. Oh, yes.

(Testimony of Sam Kleinman.)

Q. On one or more occasions that would be \$15,000?

A. Yes, one morning I came in the office, one morning I came in the office, and Mr. Kravitz called me over. He said, "Sam, there is a nice loan to be made, a nice big loan, but I can't get hold of the boys; they must have left the house, and I can't keep that customer any longer." I said, "How much does she want on that loan"; he says, "She wants \$18,000, but I think we can cut that down to \$15,000; do you think it is worth \$15,000?" I took the three pieces in my office and examined them real close. [554]

I came back and I said, "Leo, you can let her have \$15,000, you can let her have \$18,000 if she wants it, I am not cutting it to 15, let her have \$18,000." Leon says, "We haven't got the \$15,000 cash to loan out." I said, "Leo, if that bothers you, I will give you the money." I went to my box and gave him \$15,000 to make the loan. So about two or three hours later, Sol Zemansky came up and Dave Zemansky came up and they told me about that deal, saying they were kind of worried about making a big loan like that, maybe I didn't know the value of the loan, so I had an appraisal made, sent it up to Mr. J. T. who I considered to be a real expert on merchandise, and he said that that one bracelet alone is worth \$18,000, and we made on the three pieces a loan of \$15,000. I made them give it to me in writing to show to the boys

(Testimony of Sam Kleinman.)

because they were worried very much about it. I brought it back to them and they were very well satisfied. [555]

Q. Mr. Kleinman, would you loan them other sums in large denominations, say, \$4,000 or \$5,000 on I.O.U.'s?

A. I gave them as high as \$10,000, \$5,000, \$3,000, \$2,000, \$1,000, all kinds of money, and the loan I made with the \$29,000 I got 10 per cent. They had very close to \$15,000 in I.O.U.'s.

The Referee: Just a minute. This wasn't an answer to the question. The question was, when was it that you gave [557] them money on I.O.U.'s, that's what we want to know.

A. Since I have been there.

Q. Did you give them money on I.O.U.'s after January 1, 1939? A. Yes sir.

Q. How many times?

A. I should say more than a dozen times.

Q. What is the largest single sum after January 1, 1939, do you remember?

A. The largest one, I believe, one time was a little over \$5,000, one time. [558]

Q. Over what period of time would that occur that they asked you for I.O.U.'s, during what years?

A. I believe that started up sometime—the I.O.U.'s started up sometime in 1936, until about the end of 1939. I gave them before 1936, but not so much, for a day or so and sent it right back.

Q. When you gave them I.O.U.'s, was the cash-drawer empty?

(Testimony of Sam Kleinman.)

A. The cash drawer? I will tell you, they never kept much money in the cash drawer. They always kept \$20 bills, \$10 bills, \$5 bills, and \$1 bills. In other words, at times, if they had a lot of big bills, some people redeemed, like \$500 or a thousand dollars, lots of loans were around there like that, they used to keep it in the vault, and if they had one bill like that they used to keep it in the back of the cash drawer with a clip on it. I asked him once why they did that, and he said they once made a mistake and gave change back for a big bill instead of a small bill, and they did that so it wouldn't happen again.

Q. By the Referee: That was the reason?

A. That was what was told to me. [559]

Q. Do you know whether they would loan the full value of the diamonds or a lesser sum?

A. The full value in the loan department? Nobody gives a person the full value of the diamonds. They always loan less than its real value.

Q. Do you know how much less it would be?

A. Oh, sometimes they gave—it depends on the merchandise. If it is good merchandise they could give him as high as 75 per cent.

Q. But not good merchandise?

A. They would give him about 50.

Q. Then at all times the pawns that were taken in by a pawnbroker would be worth considerably more than the amount of money he had loaned out on this pawn?

A. The loan was considerably less.

(Testimony of Sam Kleinman.)

Q. Did you know that prior to February 24, 1939? Did you know before February 24th, when you entered into this contract, that the pawns that were taken in by Zemansky Brothers were worth considerably more than the loans they had made on them? A. Oh, yes, yes.

Q. Did you know what interest Zemansky Brothers were getting on those various pawns?

Mr. Laugharn: The contract is in writing and speaks [565] for itself. This would be hearsay.

The Referee: The question is whether he knew. It is overruled. Did you know what interest they were getting on those pledges? A. Yes.

Q. What interest were they getting?

Mr. Laugharn: May we have an objection to that question of the Court? The pawn agreements are in writing and are the best evidence instead of this man's interpretation of what the contract is.

The Referee: Well, you may make your objection.

Mr. Laugharn: I would like to make my objection.

The Referee: I will go over that question. Did you know what interest rates Zemanskys were getting on their pledges? Do you want to object to that?

Mr. Laugharn: No, the answer is yes to that, already.

The Witness: Yes sir.

Q. By the Referee: Now, what was your knowl-

(Testimony of Sam Kleinman.)

edge as to the interest rates they were getting, in other words, what did you believe they were getting?

Mr. Laugharn: For the record, I would like to have an objection to that on the ground that it is hearsay, that the contract itself is the best evidence.

The Referee: Overruled. What did you believe or know they were getting?

A. They were getting three per cent, and they had [566] another stamp they used, stamped on the back, "Minimum interest up to \$5 is 50 cents," and then they had a stamp where it showed two per cent for different amounts of money, and then they had another stamp that showed where they were getting three per cent.

Q. Three per cent on what amount?

A. Well, I wasn't in the loan department; I wouldn't know.

Q. I thought you said you knew.

A. I knew that because they paid it.

Q. What I am trying to find out, is what amounts of money they got the three per cent on.

A. I knew at that time when I was with them, but I have forgotten. I could think about it, in a few minutes I could recall.

Q. What loans did they get two per cent, if there were any such loans? A. Over \$200.

Q. Over \$200 they got two per cent?

A. Yes.

The Referee: All right. Proceed.

(Testimony of Sam Kleinman.)

Q. By Mr. Wolver: You knew those facts, Mr. Kleinman, prior to February 24, 1939?

A. Did I know that?

Q. Did you know this before February 24, 1939?

A. Before, yes, yes, I knew they had those stamps. [567]

Q. After you went to work for them, they had a place at 558 South Main Street and one at Seventh and Hill?

A. Seventh and Hill, yes.

Q. As an employee, did you have the opportunity between 1935 and December, 1938, to go into their vaults? A. Yes.

Q. Did you notice the number of pledges they had on [568] hand?

A. Well, only a few times, I used to go in there.

Q. And did you also know how many of these pledges were not redeemed, the pledges forfeited?

A. I never looked at them.

Q. Did you know pledges were being forfeited?

A. Oh, yes, yes.

Q. Did you sell some of those forfeited pledges?

A. Hundreds of thousands of dollars of them.

[569]

Q. Did you ever have a conversation with them concerning the sales that you had made?

A. Oh, yes, they knew all the time.

Q. In this conversation was there anything ever said as to the profit or loss in the sales that you had made?

(Testimony of Sam Kleinman.)

A. Well, he told me one time that they had over a hundred thousand dollars, about a quarter million dollars worth of merchandise, to sell and they didn't sell any and they were glad they didn't, because they turned them over to me and I got better prices.

Mr. Wolver: You may take the witness.

Cross Examination

By Mr. Chotiner: [570]

The Referee: I will ask a question here.

Q. Are you testifying now, Mr. Kleinman, that in your private office in the Provident Loan Company, you had \$1500 in cash in a box in a drawer in your desk; is that your testimony?

A. Yes sir. [575]

Q. Who was present when you gave the \$2400 back to Mr. Zemansky?

A. Mr. Zemansky came back and I told him I would have the contract made out, you sign it and I will give it back.

Q. Which Zemansky was that?

A. Dave Zemansky.

Q. Was anyone else present when you gave him the \$2400? A. No sir.

Q. Do you know what he did with the \$2400?

A. No, he just took it, that's all; I don't know what he did with it. I know he put it in his pocket, put a rubber around it. [576]

Q. When was it that he asked you for the return of the \$2400?

(Testimony of Sam Kleinman.)

A. The same day that he gave it to me.

Q. Well, when he asked you the same day that he gave it to you, what did you tell him?

A. I told him I will make out a contract for you, but I haven't got a contract made out, but I have a copy that Mr. Dienstag left with me, which was spoiled, I wrote on it, it was spoiled, I couldn't use it for anything," and I said, "I will go upstairs to the stenographer in the same building and I will have her make me out another copy and I will have it back."

Q. In other words, you didn't give the \$2400 back to Dave Zemansky until the contract was prepared by you?

A. Until the contract was made and the pledges were put in the contract.

Q. But prior to this occasion, you had given money to the Zemanskys on just plain I.O.U.'s without a contract, didn't you?

A. Oh, yes, I would give them money, too; I would give them money if they wanted it, on an I.O.U., but he offered it to me.

Q. He offered what to you?

A. He offered to give me pledges for that money.

Q. You decided then that you would give him the money when the contract was signed and the pledges were [577] set aside?

A. When he came in and asked me for that money over again, he said, "Sam, now, it don't have

(Testimony of Sam Kleinman.)

to be today or tomorrow, have the contract made and everything put in first class shape, and I will come in, you give it to me and I will sign it up.”

Q. That is all that was said?

A. That is all.

Q. Then it took two days for the contract to be ready, is that right?

A. Well, I had it done the same afternoon. I had the contract written up the same day upstairs, and then they picked out the pledges and they gave me a list of the numbers of the pledges and put the numbers of the pledges on a piece of paper and fastened it onto the contract like we did all of them, most of them.

Q. That was two days after Dave Zemansky gave you the \$2400?

A. Yes sir.

Q. As a matter of fact, Dave Zemansky told you at the time he gave you the \$2400 that he would like to borrow it back again, didn't he?

A. The same day, later on, around that afternoon.

Q. Around the afternoon?

A. Yes.

Q. Where was it that he asked you for the return of [578] the \$2400?

A. In the same place.

Q. At the Provident?

A. At the Provident.

Q. Where was it that he gave you the \$2400?

A. At the Provident. [579]

Q. By Mr. Chotiner: So we will have it clear,

(Testimony of Sam Kleinman.)

directing your attention to March 1st, which is the night when the security was given for the Simon account, after that time did you loan money to the Zemanskys on I.O.U.'s?

A. After that time? [580]

Q. Yes. A. After that time, yes.

Q. What was the total amount of money that you ever loaned them after March 1st on I.O.U.'s?

A. I gave them different amounts; I gave them different amounts, sometimes \$500 sometimes \$1,000, sometimes \$1200.

Q. What was the highest amount you ever gave them after March 1st?

A. About \$1200. [581]

Q. Now, on direct examination, you testified that you knew and had talked with Sol Zemansky about the properties that the Zemansky Brothers owned?

A. Yes.

Q. Now, which properties did you ever discuss with him in 1938, if any?

A. In 1938?

Q. Yes.

A. He was talking to me about the Glendale property.

Q. About the Glendale property. When he talked to you about the Glendale property, he told you that they had paid \$125,000 for it, isn't that right?

A. I knew that before.

Q. You also knew that there was some miniature golf course on that property?

A. They had a miniature golf course.

(Testimony of Sam Kleinman.)

Q. You also knew in 1938 that the taxes had not been paid on that property?

A. I certainly did not.

Q. But you knew some of those other places that you mentioned on direct examination were closed in 1938, didn't you?

A. Some of them were open and some of them were closed. [582]

Q. When redemptions were made of pledges that had been set aside for you for security, and new loans or new pledges were made with the money, were those pledges kept separate from the pledges that were made with other money from the cash drawer?

A. They kept the pledges that they had before.

Q. Mr. Kleinman, I will ask you if you understood my question. A. No.

Q. I will try it again, maybe it is my fault. When money would be received from customers on account of redemptions of pledges that had been set aside to you for security, and then that money would be used and new pledges would be taken in, would those new pledges be kept separate from pledges that they took in from other money?

A. Other money besides my money.

Q. Yes.

A. Well, that was promised to me, all pledges coming in. Do I know if they did that?

Q. Yes.

A. Well, they were supposed to keep them.

(Testimony of Sam Kleinman.)

Q. Do you know whether they did or didn't?

A. I didn't go in the safe to look.

Q. In other words, you don't know whether they kept them separate or not?

A. They kept them ready to pledge to me if I wanted them.

Q. Then I take it, Mr. Kleinman, you don't know whether they kept them separate or not, do you?

A. Well, I never went into the safe; I couldn't tell, never went into the safe. I seen they had them down there for me. Every time I called for them I got them.

Q. After January 1, 1939, you sold jewelry for Zemansky Brothers, is that right?

A. After January?

Q. Yes. A. From January on.

Q. I am talking about January, 1939; did you ever sell jewelry after that?

A. Oh, yes, sure.

Q. Were you permitted to keep any money in excess of [586] any price you would receive from the sale of the jewelry? A. Yes sir.

Q. What arrangement did you have with the Zemanskys as to what money you could keep from the sale of the jewelry?

A. Zemansky told me one day, around about March, of course, the bills will tell just exactly what day it was. He had called up Dave Zemansky to send him down a big sum of money; he said he needed at that time around about \$20,000 in a hurry;

(Testimony of Sam Kleinman.)

he said, "Give Sam Kleinman merchandise to sell." He told me that after he gave me that merchandise to sell, that's the time he told me after I took that merchandise out, that's the story he gave me, after I took the merchandise out to sell. So Dave told him "I can't give Kleinman that much merchandise to sell right away, you know it sells, better take that merchandise out to Morrison and borrow money on it." He told me that when he told me to take the merchandise out to Morrison. I took out close to around about \$18,000. So I said, "Why didn't you get me to sell that merchandise, maybe I could have gotten a better price." He said, "You know I can't fight with my brother, if he wants me to do that; I told him to go ahead and hurry up and get me the money," and so he got him the money on it. He said "There's no use leaving that merchandise laying around with Morrison and paying him interest; can't you handle that deal, you [587] know, I have been busy going up and down the coast; can you handle that deal for me?" I said, "Sure, I will handle the deal for you." He said "You will have to have about \$10,000 first to take one package out. Is there any way you can get that money and handle it without us giving any money to him;" they hesitated letting out any money. I said "Sure I can, I can handle that very easy." So I went up to a broker by the name of Joe Heller. I didn't tell him where the merchandise, where it might be, I just told him "If you will give me \$10,000, I will redeem a certain amount of merchandise which I will give you the privilege to

(Testimony of Sam Kleinman.)

buy, and another thing, you don't have to buy it if you don't want to. We will give you a note for six per cent", he says, "seven per cent, six or seven per cent." He said, "Well, I will tell you, I haven't got any \$10,000 of my own money right now, but I got a friend who will go in the deal; in other words, if he don't want to buy, he don't have to; you give us a note for thirty days." So he went out and called, he went back in his office and called up a friend of his.

Q. Who did?

A. Joe Heller. And he called me back later. He said, Mr. Kleinman, I got a party who is interested; he will do just what we talked about; he will give you \$10,000." He said "We will give him back the \$10,000.00." I said, "That's good, that's fair"; so I made out a note, and the [588] other party didn't know the Zemanskys very well, didn't know them very well, never done business with them, never done business, it was the first time he done that. He said "Joe, if I do anything like that, I don't know the Zemanskys, who they are, what they are, I don't know, if you want \$10,000 to do business with, take me in as a partner, I will loan you \$10,000 and give me a note. You can do with my check as you want to, but I want you and Sam Kleinman to sign it." I said "I will do better than that; I will make Sol Zemansky sign it, so you have three, one of them might be good." I explained that to Sol Zemansky and Sol Zemansky said "Sure, anything you want,

(Testimony of Sam Kleinman.)

anything you do, that was all right"; and I made out the note and had Sol Zemansky sign it and Joe Heller sign it and I signed it, and we gave that man that note for the \$10,000, I can't think of that man's name, Joe Heller's friend; the first time I ever done business in my life with him. He endorsed that check over in Long Beach and I gave it to Sol Zemansky and Sol Zemansky took the check from me to get back the diamonds from Mr. Morrison.

Q. When was that that this happened?

A. I told you that a minute ago, I can't remember the date exactly.

Q. Was it before you got your security or after?

A. After.

Q. Did Dave tell you why he needed the money?

[589]

A. No sir.

Q. Did you ask him?

A. No sir. [590]

Q. Did the Zemanskys, any of them, tell you about the transaction with Morrison, as to how they happened to have jewelry with Morrison?

A. I told you before.

Q. Who told you about that?

A. Sol Zemansky.

Q. Sol Zemansky told you they needed money, that they could not wait for you to sell it, so they took that jewelry to Morrison and borrowed money on it?

A. Yes sir.

(Testimony of Sam Kleinman.)

Q. Sol Zemansky told you the reason they did that, they needed money in a hurry in the business, is that [592] right?

A. Yes, he was out of town and he needed the money some place.

Q. Did he tell you why they needed the money in such a hurry?

A. No, I never questioned them; they always needed money.

Q. During the time that you were loaning money to Zemanskys, did you keep any record of the money that you were loaning to them?

A. Book records?

Q. Any kind of a record on a piece of paper, or anything?

A. No; I.O.U.'s, I got.

Q. In other words, you never kept a sheet of paper on which you listed any of those payments, is that right?

A. No, never.

Q. Whatever I.O.U.'s were repaid by the Zemanskys, you would return the I.O.U.'s to the Zemanskys, is that right?

A. Yes sir.

Q. Then you wouldn't have any record as to the transactions with Zemanskys? [593]

A. Only the promissory note.

Q. Just the promissory note?

A. Yes sir.

Q. Did you ever keep a book in your office up there at the Provident showing the sales of jewelry that you made?

A. Absolutely.

Q. You did keep a record there?

(Testimony of Sam Kleinman.)

A. Of the jewelry I sold for the Zemanskys, yes sir.

Q. What record did you keep of them?

A. The bills, when I used to sell jewelry.

Q. In other words, those were the regular sales books? A. Sales books.

Q. Did you ever keep a record as to the amount of interest that you received from Zemansky Brothers? A. Never.

Q. In other words, you never kept a list any place as to the checks that you got from Zemanskys on interest? A. No sir.

Q. Did you deposit in your bank account all of interest checks that you received from the Zemanskys?

A. Sometimes I went to the bank and cashed it and sometimes I deposited it.

Q. Did you keep a record any place as to the checks that you did not deposit but merely kept the money? A. No sir. [594]

Q. Did you ever keep a record any place, Mr. Kleinman, of the principal amount of money that was ever paid to you by Zemanskys?

A. Principal?

Q. Yes. A. No, I never did, no.

Mr. Chotiner: I think that is all, your Honor.

The Referee: Mr. Zemansky, how did you make up an income tax return?

A. I done business with three people, three people.

(Testimony of Sam Kleinman.)

Q. When it came time to make up your income tax return, for the year 1939, where did you go to find out how much interest you had received in the year 1939?

A. Zemansky Brothers gave me a list.

Q. Zemansky Brothers? A. Yes.

Q. Zemansky Brothers were out of business in March of 1940. When you had to make out your income tax return for 1939, when you made up your income tax return for the year 1939, which you made up between January 1st and March 15 of 1940, unless you've got any since that time, where did you go to find out how much interest you had received? A. I knew that.

Q. What?

A. I knew what I had received.

Q. You mean, you just put it down from memory? [595]

A. Yes, only a couple of months, only a few months.

Q. Zemanskys did not close up until July 10th, 1939? A. Yes.

Q. You mean to say you made out your income tax return in so far as it related to the interest from Zemanskys, from memory, is that right?

A. Well, I knew I got one check for \$800 in interest, and I knew I got \$2400 interest, and I knew I had so many weeks' salary.

Q. I am not talking about your salary; I am talking about interest.

(Testimony of Sam Kleinman.)

A. Interest, I only had two payments of interest.

Q. The \$800 you got in the month of March?

A. Yes sir.

Q. What about interest in January and February of 1939?

A. January, I can't really figure that out. I will tell you how it was, you mean the income tax return for 1939. Well, 1939, I figured out so many months at so much interest.

Q. In other words, the answer is, you made out your income tax return from memory?

A. From memory, yes. [596]

SAM KLEINMAN

recalled for

Redirect Examination [598]

By Mr. Wolver:

Q. Mr. Kleinman, you told Mr.—let me ask you this: After you returned from San Francisco and the contract of March 1st was signed, did you go into the vault of Zemansky Brothers?

A. After my contract was signed?

Q. Yes. A. With Zemansky?

Mr. Chotiner: I object on the ground that it has been asked and answered.

The Referee: Overruled.

A. Do I have to answer?

The Referee: Yes. A. No sir.

(Testimony of Sam Kleinman.)

Mr. Wolver: Q. Can you tell the Court why you didn't go into the vault after that time?

A. Well, before that, all the time before that, when the girls were gone out to lunch, they used to ask me, "Sam, get this out," and I used to go to the box and look around the pledges. One of the boys, like Leo Kravitz, used to ask, "Why does it take you so long?" I said, "Why, I am not acquainted around here"; it took me so long to get a pledge out. After I got the pledge out, I used to ask someone to figure the interest for me, to deliver the pledge to a customer. He used to say "You are more of a nuisance than a help." I said, "I am not [606] supposed to do that; I am just to help you out as much as I can."

Q. Well, now, why didn't you go into the boxes after March 1st?

A. After March 1st the merchandise was so differently arranged, and Mr. Leo Kravitz told me, he said, "Sam, you didn't know how to handle it before, we had a lot of trouble with picking out the stuff before to deliver to a customer; you can't do it now, you better not go in there; leave that for us to do."

Q. So you didn't go in there?

A. So I didn't go into it.

Q. Did you at any time after that return any pledges to a customer for exemption?

A. Did I what?

Q. After March 1st, did you ever give back any pledges to any customer for redemption?

(Testimony of Sam Kleinman.)

A. Once in a while, if I was behind, when one of the boys went out to lunch, Leo used to check them off the stub, put on the back of the stub the amount of interest that was due. He used to say, "Will you please give this to the gentleman or lady, I want to deliver it," and I knew exactly just what to do. It was already written down on the stub on the back. [607]

DAVE ZEMANSKY,

recalled as a witness in rebuttal on behalf of the Trustee, having been previously sworn, testified as follows:

Direct Examination

By Mr. Chotiner:

Q. Directing your attention now to the note and contract dated July 5, 1939, in the sum of \$2400; you now know what note and contract I am referring to? A. No sir.

Q. Do you remember the last note and contract that was executed for \$2400?

A. No sir. I have seen these many different notes, but, to be sure, could I see the note.

Q. In the month of July, 1939, did you pay the sum of \$2400 to Mr. Kleinman in cash?

A. No sir.

Q. Now, directing your attention to the date that the petition was filed by Zemansky Brothers on July 10th, 1939, now, bearing that date in mind,

(Testimony of Dave Zemansky.)

do you recall the last contract that you signed for Mr. Kleinman and the last promissory note for \$2400? [611]

A. If I could see the note.

The Referee: We don't have apparently the original here. Do you have the original? Perhaps seeing the signature will refresh his recollection. Is it stipulated that the witness may be questioned on the original of the contract and the note of July 5, 1939, without their being offered in evidence, copies already being in evidence?

Mr. Dienstag: I think it has been stipulated that copies are in evidence, as being true and correct copies of the originals.

The Referee: May he be questioned on the original without the original being put in? Any objection?

(No objection). So ordered.

(Question read).

A. Yes sir.

Mr. Chotiner: Q. What was that note and contract executed in payment of, do you know?

A. Well, I'll tell you, if you remember—if I might tell it in my own words—I testified previously on that three months' interest of the \$100,000, where the new contract was made, it was put into a note. I was under the impression it would be a note where the other pledges were put in. Now, I signed quite a few \$5,000 notes. Now,

(Testimony of Dave Zemansky.)

evidently, this is three months' interest at \$800 a month.

Q. Prior to executing that note and contract, did you [612] give Mr. Kleinman twenty-four one hundred dollar bills? A. No sir.

Q. Did Mr. Kleinman give you twenty-four one *hundred bills* at the time that you executed that note and contract? A. No sir.

Q. Did you tell Mr. Kleinman that you needed \$2400 at the time you executed that contract and for him to give you back the \$2400?

A. No sir. [613]

Q. Now, Mr. Zemansky, what was done with the pledges that would be taken in from day to day up at the Provident Loan Association, as far as the place where they were kept in the vault?

A. They were put in shoe boxes and also envelope bags they had, envelope bags, and they were put in those bags by the day, the day's business in one of those bags, and then in that vault there are some aprons halfway down the vault, steel aprons; you can pull them out and re-set them on those aprons.

Q. Was that system followed before Mr. Kleinman obtained his security? A. Yes sir.

Q. Was the same system followed after he obtained his [614] security? A. Yes sir.

Q. What was the reason for putting the pledges in the shoe boxes?

A. Well, we would leave them there a day or

(Testimony of Dave Zemansky.)

two and then we would sort them by numbers and put them away in rotation.

Q. Was that same system followed, and was that the same reason that you used to put them in shoe boxes before the security was given to Mr. Kleinman? A. Yes sir.

Q. Was that the same reason that system was followed after you gave security to Mr. Kleinman?

A. Yes sir. [615]

Q. Mr. Zemansky, did you have any conversation with Mr. Kleinman after the security had been given to Mr. Simon regarding the condition of the Simon account? A. Yes sir.

Q. Where did this conversation take place?

A. Over at the Main Street store.

Q. And when?

A. Well, it was different times after we entered into the new contract with the Simons' Dairy Lunch.

Q. Did any of those conversations take place before the Simons' security was set aside for them?

A. No sir, I don't think so.

Q. What were the conversations that you had with Mr. Kleinman regarding that subject?

Mr. Dienstag: May we know if anyone else was present?

Mr. Chotiner: Q. Was anyone else present?

A. No sir.

Q. What were the conversations?

A. I used to be in the Main Street store in

(Testimony of Dave Zemansky.)

the evening. We were running an auction and I have to get things ready for the next day, and along about 8:00 P.M. or so, around that time, Mr. Kleinman came in at different times and he told me he had dinner at Mike Lyman's restaurant, [617] Mike Lyman's cafe, and he said he spoke to Bill and Bill was in a very bad frame of mind because I hadn't sent him nothing on account. Later I sent a check.

Q. To whom did you send the check?

A. I mailed the check to Simons' Dairy Lunch. Mr. Kleinman suggested I write some smaller checks and he would take them over and give them to Mr. Simon.

Q. Did you make out smaller checks and give them to Mr. Kleinman? A. Yes sir.

Q. What did Mr. Kleinman say he was going to do with them, if anything?

A. He would take them over there. He wanted to be sure I was making them out five days apart, to be deposited five days apart.

The Referee: What does the record show as to when that conversation was had between Mr. Kleinman and Mr. Zemansky, in which Mr. Kleinman said Lyman was dissatisfied with the way he was getting his money, prior to the Simons' attachment?

Mr. Chotiner: That is correct.

Q. Mr. Zemansky, do you know whether or not Mr. Kleinman ever paid any money to the Simons

(Testimony of Dave Zemansky.)

people on account of the money that was owing to them by the Zemanskys?

A. I believe he did several times.

Q. And do you recall how much that was? [618]

A. No, I don't know exactly but several times he paid them.

Q. Did you ask him to do that?

A. Why, he asked me if I had the money to pay them. I told him no. I said, "Sam, maybe you could pay them and then we would pay it back to you."

Q. What were the circumstances of his paying that money to Simons on account of Zemansky Brothers obligations, how did that happen? When you said you couldn't pay them, what did you mean by that, Mr. Zemansky?

A. William Simon called me up several times. He threatened to attach the place.

Mr. Miller: I move that that be stricken on the ground that it is hearsay.

The Referee: Yes, that may go out.

Mr. Chotiner: Q. Did you have a conversation with Mr. Simon?

A. Yes, several different times.

Q. Can you tell us what Mr. Simon told you—did you tell Mr. Kleinman about your conversation with Mr. Simon? A. Yes sir.

Q. What did you tell Mr. Kleinman?

A. I told him Mr. Simon called up and he insisted on having some money.

(Testimony of Dave Zemansky.)

The Referee: One second, please—proceed.

Mr. Chotiner: Q. What else did you say, if anything? [619]

A. I told him we didn't have it to send.

Q. What did Mr. Kleinman say then?

A. Well, he wanted to know what we were going to do about it.

Q. Will you go ahead and tell us the conversation that took place between yourselves?

A. I said, "Maybe you could pay him a little on account, then we would pay it back to you."

Q. Was that an occasion then when Mr. Kleinman paid some of the money to Simon on account of the obligation? A. Yes sir.

Q. Do you recall what month that was, whether it was in April or any other month?

A. Well, that would be after the new contracts.

Q. About how long after the new Simon contract was it?

A. After the first two months we were able to keep up the interest, so it was after that.

Q. In the first two months and earlier, you were able to make your payment to Simon, is that right? A. Yes.

Q. Then it was shortly after that, is that correct?

A. I might explain the reason for that. You see, the money we were having from redemptions we were depositing in the bank, so we would have no occasion to use that money, but when the last

(Testimony of Dave Zemansky.)

pledge contract with Mr. Kleinman was made, we used that money over for new loans, so that gave [620] us a little money over the new loans.

Q. Did Mr. Kleinman tell you why he would make payments for you? A. No sir.

Q. Did you pay Mr. Kleinman for the money that he had advanced to Simons?

A. I don't think so; I think that is part of the I.O.U.'s that we signed at different times.

Mr. Chotiner: That is all.

Cross Examination [621]

By Mr. Dienstag:

Q. Approximately how much, Mr. Zemansky, did the sales of jewelry by auction amount to in 1939 at 558 South Main Street—well, the records show, if your Honor please. This is a Namson and Young report. [623]

The Witness: It was an unusual amount. I can tell regardless of the records; it was an unusual amount. We ran auctions six days a week, used to take in about \$200, as much as \$300 a day.

The Referee: Q. How long did you run these auctions?

A. Right up to the time of the attachment.

Q. In 1939, every week day?

A. Up to the time of the attachment, every week day, six days a week, so someone can figure that out, although we did have a record of the sales. I don't know who has it, Mr. Holdrege or—

[624]

(Testimony of Dave Zemansky.)

Mr. Dienstag: Q. You have said that the money which was received from Kleinman's redemptions or, you used the term, you got some money *out them*; by that, did you mean you were able to re-loan that out on new pledges?

A. Yes.

Q. So that you used the money to loan out on new pledges? A. Yes sir.

Q. That is correct, is it? A. Yes sir.

Q. And all pledges that came in, Mr. Zemansky, were kept in these boxes, these cardboard boxes?

A. Yes.

Q. Now, do you recall, Mr. Zemansky, how much cash you had on hand at the Provident and at 558 Main Street at the time that the Sheriff came in approximately the 8th day of July?

A. Yes, I think the Sheriff gave me a receipt at that time for two hundred and some odd dollars.

Q. That was on the 8th? A. Yes. [625]

Q. Was there jewelry redeemed at 558 South Main Street in the same fashion as it was at the Provident, people came in and redeemed their jewelry? A. Yes sir.

Q. You were also conducting an auction there, where you took in anywhere from one hundred to two hundred dollars a day?

A. Yes sir, probably a little more some days.

Q. A little more some days?

A. Yes, but most of the days we considered anything over \$100 good.

(Testimony of Dave Zemansky.)

Q. That was true of the 5th day of July, the 6th day of July, the 7th day of July, the 8th day of July, all those days until the Sheriff came in?

A. Up to the time that the Sheriff came.

Q. Do you know how much money you took in at the Provident Loan—I will withdraw that. Mr. Zemansky, you from time to time would borrow money from Mr. Kleinman on I.O.U.'s, I think you so testified? A. Yes sir.

Q. And Sam would hand you the cash, wouldn't he? A. Yes sir.

Q. And he would take it out of his desk?

A. Yes sir.

Q. He would take it out of what you might call a strong box? [626]

A. I believe he had an iron box in the desk, but he also had a desk lock. The desk was locked.

Q. What I am getting at, he did take money out of that iron box and he would let you have it?

A. Yes sir.

Q. They were substantial sums sometimes?

A. As a rule, he always used to give us \$100 bills.

Q. You would get five hundred or a thousand dollars from him?

A. Yes, then he would hand me as a rule one hundred dollar bills.

Q. In substantial sums? A. Yes. [627]

Q. On those occasions when you asked Mr. Kleinman for a loan of money, did you have any diffi-

(Testimony of Dave Zemansky.)

culty, experience any difficulty in getting such a loan? A. No sir.

Q. As a matter of fact, it was handled very casually, [630] wasn't it?

A. Yes sir; sometimes he would send it down with the colored porter we had up there.

Q. Whenever you were in need of money you would call Mr. Kleinman because you knew that he had been loaning you money and would do so?

A. Yes, and Mr. Kravitz would speak to Mr. Kleinman.

Q. You have testified once before on the stand, I believe, that beginning about the middle of 1936 you had these I.O.U. transactions? A. Yes.

Q. From that time on, there would never be any difference when you put in a call for money?

A. No sir.

Q. He would give it to you, he would get the money out of the cash box that he had in his own desk?

A. Yes, and then we made it into the \$5,000 notes. [631]

By the Referee:

Q. Now, on that same point, calling your attention to the day when Simons actually attached, do you now recall that you had any conversation with Mr. Kleinman before that date, in which you mentioned the Simons' transaction? A. No.

Q. You don't remember any such conversation?

[635]

A. No. [636]

ISAAC PACT,

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

The Referee: Your name is Isaac Pacht?

The Witness: That is right.

Direct Examination

By Mr. Wolver:

Q. What is your trade, business or occupation?

A. I am an attorney-at-law.

Q. Judge Pacht, were you present at a conversation had on or about the 28th day of February—on or about March 1st, at your office, at which Mr. Kleinman, Mr. Dienstag, Mr. Sol Zemansky and Mr. Lyman and Mr. Simon were present? [649]

A. I was.

Q. Do you recall about what time of day or night that was?

A. I think it was from about 8:00 o'clock until midnight.

Q. Did any part of that conversation pertain to the solvency or insolvency of Zemansky Brothers or Sol Zemansky? A. Yes.

Q. Did it pertain to Sol Zemansky or Zemansky Brothers? A. Zemansky Brothers?

Q. Do you recall that conversation in that regard, Judge Pacht? A. Yes.

Q. What was it?

A. It was substantially a continuation of a conversation or conversations that I had had with Mr. Sol Zemansky and with my client, in regard to giv-

(Testimony of Isaac Pacht.)

ing them an extension of the notes which they originally held and a reduction in the rate of interest. In substance, the conversation was this: In behalf of our client, Simons' Lunch Rooms, Incorporated, we had levied an attachment on the place of business of Zemansky Brothers. There had been efforts made to release the attachment and make some kind of a deal whereby Zemanskys would pay part of their obligation down and arrange for making payments thereafter [650] in installments. I think Mr. Dienstag said that in some transaction that he had had in San Francisco, covering a similar situation, arrangements had been made whereby the debtor, who was a pawnbroker, would pledge as collateral what would be owed on the notes from the pledgors as collateral for the pawnbroker's indebtedness. He thought that a similar arrangement could be made with my client so as to have a duration of the attachment. I stated in substance, "Now, what's the use of prolonging this? If you are bankrupt"—addressing myself to Zemansky, "If you are bankrupt, if you are insolvent, let's know about it now and if my clients have to take a loss on this thing, they will take it and get it over with. If you can't pay your debts in full, tell us so and we will know where to go from there. It is not the first time that a creditor has had to write off an obligation in whole or in part." Mr. Zemansky, Sol Zemansky, who did the talking, as I have no personal recollection as to whether

(Testimony of Isaac Pacht.)

one of his other brothers was there or not, I think one of his other brothers was there, said in substance that they were solvent, that they had more assets than liabilities, enough to cover all their liabilities, but they were hard-pressed for ready cash, and if we would give them the time they would pay out. Now, that is in substance what Sol said.

Q. Was Mr. Kleinman there at that time that this was [651] said? A. Yes.

Mr. Wolver: Your witness, Mr. Chotiner.

Mr. Chotiner: No cross examination.

The Referee: All right; thank you, Judge Pacht.

Mr. Wolver: May it please the Court, we have two other witnesses who were present at that conversation, and who can testify to the same thing. May we have a stipulation, if Messrs. Simon and Lyman were called, they would testify substantially the same as Judge Pacht, as to the conversation?

Mr. Chotiner: So stipulated. [652]

Mr. Laugharn: As a starting point, I think from the Trustee's position we concede the gross amount of the claim; in other words, before the hearings we had a question with respect to the \$1100 amount, with respect to the \$1200 amount, the \$1,000 and the \$3,750, and the I.O.U.'s held by Mr. Kleinman. Now, we feel that our position with respect to the \$1200 item has been cleared up and the claimant has shown that item. We feel the claim-

(Testimony of Isaac Pacht.)

ant has shown the item of May 13th of \$1,000. We have no further evidence in connection with the \$3,750 of June 2nd, other than what has been introduced, and we have no further evidence to show that there is no [655] consideration supporting it. I think the testimony is that it was for I.O. U.'s——

Mr. Wolver: And cash. [656]

EDWARD DIENSTAG,

called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

The Referee: Your name?

The Witness: Edward Dienstag?

Direct Examination

By Mr. Wolver:

Q. Mr. Dienstag, when did you first discuss with any of the Zemanskys the question of loans owed by the Zemanskys, or notes owed by Zemanskys to Mr. Kleinman?

A. The middle of February of 1939, about the 10th or 11th or 12th.

Q. Now, Mr. Dienstag, will you tell us who was present, where it occurred and give us the conversation in substance or in words?

A. The conversation took place at the Provident Loan Association in Los Angeles at 706 South Hill Street. There were present Mr. Sol Zemansky, Mr. Sam Kleinman and myself. Mr. Sol Zemansky

(Testimony of Edward Dienstag.)

came in the office where Mr. Kleinman and I already were, and after greeting one and another by saying hello, I said to Mr. Sol Zemansky, "Sol, Sam tells me that he has about \$100,000 with your firm." I said "I have advised him to have that sum secured. Sam tells me that he is not working for you any more and that he is going to take a long vacation." I said "Sam told [700] me that he had already talked to you and you said you would give him security. What kind of security have you to give Mr. Kleinman." Sol said, "Well, Ed, as you know, we have various enterprises throughout the State. We have quite a bit of money invested and we haven't much ready cash. What ready cash we have we can use in our Loan Department here. However, we have several hundred thousand dollars worth of pledges." I said, "That sounds all right to me; why can't we have the pledges?" Sol said, "You can, but I want to call your attention to one thing." He left the room and came back shortly thereafter with a copy of a pledge ticket, which bore on the face, I think, Provident Loan Association. He said "Read this printing on the back. That is the Pawnbroker's Act." He said, "There is some provision in there about not giving up the possession of these pledges," but he said "I don't think it really means that, because I had my attorney, Charley Lyons, the assemblyman, work on this bill" and he said "I never intended it should mean that a pawnbroker should not be able to re-

(Testimony of Edward Dienstag.)

pledge his pledges because that was one of our sources of getting in money," but he said "It may mean that." I looked it over and said, "Well, I could not tell very much about those things; I will look up the law on the subject." I said, "If it can be arranged and you can give Sam this security, all right." He said, "I will be glad to; I have already told Sam I would." I [701] said "Well, I will take this with me, Sol, and I will look it over and see what I can discover about it."

Q. Did he ask you to do anything with this instrument that he gave to you, Mr. Dienstag?

A. Well, not with that one, but later that day I was down at 558 Main Street, looking to see whether they had on the premises a moving-picture camera which I could buy. Sol came in and he gave me a copy of the Main Street pledge ticket and showed me some wording on the back of that ticket. I said, "Sol, I would like to take this along with me." He said "If you are going to take that one, Ed, you may take it," and I took it with me.

Q. Did you return to San Francisco after that?

A. Yes sir, I did.

Q. While in San Francisco, did you examine the law? A. I did.

Q. Did you subsequently return to Los Angeles?

A. Yes.

Q. About when did you return to Los Angeles?

A. I returned to Los Angeles either the 16th or 17th of February. I was in Los Angeles on the 17th of February, which is my birthday.

(Testimony of Edward Dienstag.)

Q. Do you recall if you had a conversation with Mr. Zemansky upon your return to Los Angeles?

A. Yes, I did.

Q. Which Mr. Zemansky? [702]

A. Mr. Sol Zemansky.

Q. Tell us approximately when and where it occurred, and will you give us the substance or words of the conversation?

The Referee: Was Mr. Kleinman there at this second conversation?

A. Yes, your Honor. That conversation took place in the office of the Provident Loan Association, in the office occupied by Mr. Sam Kleinman as his office. Mr. Sol Zemansky was there. I had with me notes on the subject of the law regarding pawnbrokers' pledges and the re-pledging by pawnbrokers of their pledges and the subject of assignment of accounts receivable. I said to Mr. Sol Zemansky, "Sol, I have got this problem worked out." I said, "I believe under the law, under this Pawnbrokers' Act, which I have looked into, that you cannot give the pledges which contain the jewelry that you have taken from customers to anyone as security, you cannot give up possession without violating that law and committing a misdemeanor. However," I said, "these pledge tickets that you give to the customers constitute a promise on the part of these people to pay you certain sums of money." I said, "You can assign your right to receive this money." I said, "That is a very com-

(Testimony of Edward Dienstag.)

mon procedure and it is done all the time and such things are given as security to various finance companies." I then told him that so far as the [703] actual law on the subject was concerned, I could only find three cases in the entire United States of the exact question of giving up the possession of pledges where a statute existed which would permit it. I then had with me notes of the proposed agreement which we finally entered into and read them to him with regard to the various provisions. Sol said, "Ed that seems like the ticket to me; I think that will be all right. Will you prepare the agreement?" I said, "Yes, I will, Sol."*** [704] "All right, Sol, I will complete this entire contract ready for you to sign, but in order to do so I have to have the numbers of the pawn-tickets and the pledges so that I can type them and put them in the contract." I said, "I am in a hurry to get out of here, I have got to [706] get back to San Francisco. How soon can you get those numbers?" Sol said, "That's easy," and he walked to the door and called for Leo Kravitz. Leo came in and he said, "Leo, I would like you to pull out about \$100,000 worth of pledges for Sam. Will you do that?" Leo said he would and he said, "Shall I do that alone?" Sol said, "No, you better have Sego." Sol turned to me and said, "Will that be all right?" and I said, "Yes, I think I will come up here and help them get this over with." Then I said, "Leo, how

(Testimony of Edward Dienstag.)

about having dinner together and we will come back later." Leo said that will be all right.

Q. Do you recall when the pledges were actually taken, Mr. Dienstag, the date?

A. Yes, that was on February 20th, the evening of February 20th, after dinner; rather, it was about 7:30.

Mr. Chotiner: Will you clarify what you mean by "taken"; you don't mean they were taken off the premises?

Mr. Wolver: No, when they were segregated. [707]

Q. Will you describe for the benefit of counsel and the Court the operations that occurred that night in the segregation of the pledges?

The Referee: May I ask again for the date when that happened?

A. The segregation of the pledges, February 20th.

The Referee: 1939?

A. Yes, your Honor.

The Referee: All right, go ahead.

A. On that evening we returned to the Provident Loan Association. Mr. Kravitz opened the vault, which had been closed apparently, and brought out of the vault two steel boxes containing little envelopes which had on them a serial number and a certain amount of money varying from \$50 to \$300 on each particular envelope. These envelopes were standing on edge, supporting each

(Testimony of Edward Dienstag.)

of the other envelopes in front and back, with a number on the top of the envelope. Leo brought those in to an office occupied during the day time by Miss Brown, secretary for Mr. Joseph Zeman-sky; he had an office there, and in which [708] office there was an adding machine. We took turns —by “we” I mean myself, Leo Kravitz and Sego —in reading the numbers of the pledges, on the pledge bags, and the amounts, and one or the other of us would then run the amount off; as the numbers were read, the amounts were read on the adding machine at the same time and I personally also would write down those numbers on a large yellow work-sheet. As we finished a box in that fashion, we would total up the amount of the pledges in that box on the adding machine. Mr. Kravitz kept bringing out more boxes until the last box was handled, and there were about \$107,000 worth of pledges selected.

(A short interruption on another matter).

The Referee: Now, Mr. Dienstag, you can carry on with your answer.

The Witness: After we had reached that point of \$107,000, we stopped selecting and segregating the pledges, and Mr. Leo Kravitz, under my direction, marked a “K” beside a serial number appearing on the face of each of those steel boxes. They were marked “K-1” “K-2”, “K-3” and so forth, on each one of the boxes, and I am under the im-

(Testimony of Edward Dienstag.)

pression that there were at that time about eight or nine such boxes. There was then cleared out of the vault safe a line of steel drawers on the right side, the steel drawers facing the back of the safe from the door. [709] In the place so cleared, these boxes containing the pledges so segregated and listed were put one below the other so that they were in consecutive order in one row. I then took the yellow sheets containing the numbers of the pledges and the amount appearing on the envelopes.

Mr. Wolver: Q. Was anything done with those sheets, Mr. Dienstag? A. Yes.

Q. Do you recall what was done?

A. A copy of those sheets was made, that is, I mean in writing, and was given to Mr. Abe Zeman sky by me with directions to take out of the regular books, bound books, of pawn-tickets, the pawn-tickets corresponding to those numbers, placing them in order and to put them in separate books. The other copy, that is, the original copy made that night, I took to my office in Los Angeles and directed the secretary to type them on legal-sized sheets and to list them as Exhibit A.

Q. Did you have the contract drawn up in final form?

A. The contract at that time had been drawn up in final form except for the numbers of each pledge ticket.

Q. Now, when the contract was completed, what, if anything, did you do with it?

(Testimony of Edward Dienstag.)

A. The contract was completed I believe on the afternoon of the next day, but I did nothing about it because I was in a trial in Long Beach at that time. The [710] following day, the 22nd, I went over to the Provident Loan Association, to the office of Mr. Kleinman and told him to sign the contract.

Q. How many contracts did he sign?

A. Two.

Q. Duplicate copies?

A. Yes. He signed them and I said, "Let's get hold of Sol and have him sign them." Sam said, "I don't know where he is, I haven't seen him this morning." I looked out of the door and saw Mr. Abe Zemansky. I said "Where is Sol?" and he said "Sol has been called up North." I said "Well, gee, that's a fine thing for him to do; here I have been breaking my neck to get this thing ready for him and he is gone." Abe said "Well, he was called in a great hurry, he just had to go up there." I said, "Well, then, Abe, I have got to get back to San Francisco and I will see him there when I get up up there." I left Los Angeles that evening.

Q. When you left, what, if anything, was done with the contracts? A. I took them with me.

Q. Now, did you contact Mr. Zemansky in San Francisco?

A. The morning after I got to San Francisco, I called the St. Francis Hotel and asked whether Mr. Zemansky was registered there, I asked whether Mr. Zemansky was there, and they said

(Testimony of Edward Dienstag.)

he wasn't there but he had registered. I [711] said, "Well, then, will you be so kind as to have him phone me as soon as he comes in." I received a telephone call from Mr. Zemansky on the following morning, which would be February 24th. I said, "Sol, I have brought the contracts here with me because I was told you were here and I had to be here myself. I want you to come over to the office and sign the contract and the notes." Sol said, "I will come over, Ed, but I have got to go over to Oakland, to El Cerritos, this morning; what time in the afternoon will be all right?" I said, "Any time around two or three." Sol said "I will be there." Then that afternoon, sometime between two and three o'clock, Mr. Zemansky came in the office and I gave him the contracts to sign. He said "Are these the same ones I read," and I said yes, and he looked through them and signed both contracts. I then gave him the series of twenty notes of \$5,000 each to sign, which he did, and I believe he said, "Did Sam come up with you?" and I said "No, he didn't." I said "What brings you up here, Sol?" He said, "I had some business at El Cerritos." Prior to Mr. Zemanskys arrival in my office, I believe it was prior to his arrival, I had the notes, that is, the notes prior to these notes, photostated.

[712]

Mr. Wolver: Q. What was done with the copies of the contracts at that time, Mr. Dienstag?

A. I retained one and gave the other, which had

(Testimony of Edward Dienstag.)

Mr. Kleinman's signature on it, to Mr. Zemansky.

Q. Did you see Mr. Kleinman after that?

The Referee: When was it that Mr. Sol Zemansky signed the contract?

A. On February 24th.

Q. At what time of the day?

A. Oh, about two or three, as close as I can remember.

Q. Did he sign the notes at the same time?

A. Yes, your Honor.

The Referee: All right. Proceed.

Mr. Wolver: Q. Did you see Mr. Kleinman after that?

A. Mr. Kleinman arrived in San Francisco the following morning, February 25th.

Q. After that, did you have any other conversation with Mr. Zemansky?

A. Yes sir. [713]

Q. When was the next time you had any conversation with Mr. Zemansky?

A. I believe it was the evening of February 27th. I answered a ring on the telephone at my home.

Q. Can you tell us what occurred then?

A. Well, the operator said long distance is calling from Los Angeles. A voice came on the phone, which I recognized as Sol Zemansky's. I said, "Hello, Sol." He said, "Ed, is Sam there?" I said, "Yes, he is." He said, "May I speak to him?", and I said "Yes, Sol." I called Mr. Kleinman to the phone.

(Testimony of Edward Dienstag.)

Q. You didn't participate in that conversation?

A. I did not.

Q. After that, did you return to Los Angeles?

A. I returned to Los Angeles the following morning with Mr. Kleinman.

Q. How did you go? A. By airplane.

Q. Do you recall approximately when you arrived in Los Angeles?

A. I believe that we arrived at five minutes to eleven; that is, in the morning.

Q. Did you have a conversation with any of the Zemanskys after that? A. Yes.

Q. Will you tell us who was there, where it occurred, [714] and tell us the conversation?

A. I went over directly to the Provident Loan Association with Mr. Kleinman, and went into Mr. Kleinman's office. About two or three minutes after we got there, Sol Zemansky came in. Sol said, "Hello, boys" to us, and we both I think said "Hello" to him, and Sam Kleinman said to Sol, "What is this matter, you want twenty-five or thirty thousand dollars?" Sol said, "Well, the Simon boys have placed an attachment on the premises and there is the Sheriff sitting out in the hall." Sam said, "What do you mean, why have they placed an attachment, what have you got to do with them?" Sol said, "We borrowed some money from them some time ago and all of a sudden they had the Sheriff out there." Sam said, "What do you want me for, what do you want me

(Testimony of Edward Dienstag.)

down here for?" Sol said, "Well, Sam, we want to raise some money to lift this attachment." Sam says, "Bring some jewelry over here; I can sell as much as you want me to, \$50,000, \$100,000, \$250,000, anything you bring over, and we will lift the attachment." Sol said, "No, Sam, we can't sell it fast that way, we can't get any price for it." He said, "I have a fine idea in my head." He said, "Ed, are you going to be here very long?" I said, "Well, I will be here at least a couple of days because I have some business here." He said, "Well, will you be around so I can reach you?" I said, "You can always get me at my [715] office." With that, I left.

Q. Did you have any other conversation with Mr. Zemansky during the day?

A. I don't think I had any more conversations that day.

Q. Will you tell us the next time you had a conversation with Mr. Zemansky?

A. On March 1st, that is, the following day I came up to the Provident Loan Association to see Sam. Sol came in later and said, "Ed, I am trying to get a meeting with Judge Pacht, who represents Mr. Simon and Mr. Lyman." He said, "Where can I get hold of you later on?" I said, "Well, I will drop in about five when you close to go home with Sam. If you want to get me any sooner try my office, although I don't think I will be there later this afternoon."

Q. Mr. Dienstag, do you recall when the Simons'

(Testimony of Edward Dienstag.)

contract was signed? A. Which contract?

Q. The Simons' contract?

A. It was signed the evening of March 1st, I believe.

The Referee: One minute.

(A short interruption on other matters).

Mr. Wolver: When was this conversation that you have referred to in regard to signing the Simons' contract? [716]

A. As I recall it, it was the next day, in the afternoon. Sol asked me whether I would be back and said that he was trying to make an appointment with Judge Pacht.

Q. If you arrived, as you testified, on February 27th, the next day would be February 28th?

A. That is right. No, if I am not mistaken, we arrived here the morning of the 28th and the conversation took place there in the afternoon of the 28th. When I had come back, Mr. Sol Zemansky told me he was trying to make an appointment with Judge Pacht. I told him I would be back about five to go home with Sam. When I got back, he said that he had reached Judge Pacht. Sam Kleinman was there and myself and Sol Zemansky, and he said he had reached Judge Pacht; that is, Sol said that, and he had an appointment for 8:00 o'clock, I think it was, that evening with Judge Pacht and his clients, Mr. Lyman and Mr. Simon. He said to me, "Ed, will you come along?" I said, "What for, Sol." He said, "Well, I think that I can

(Testimony of Edward Dienstag.)

settle that matter by giving them pledges as security," and he said, "When we will get into that, you can explain that to Judge Pacht much better than I could." I said, "We will be glad to go along, Sol, if you want me to." He said, "Sam, do you want to go up, too" and Sam said, "All right." Sol then said, "Well, we might as well have dinner together," and he suggested some place on Main Street, a steak place, Oddfellows' Grotto or Goodfellows, [717] something like that.

Q. You mean the Goodfellows' Grotto on Main between Third and Fourth?

A. Yes. And we went up to Judge Pacht's office I think about 8:00 o'clock, we arrived in the anteroom. Mr. Lyman and Mr. Simon were waiting there and one of those gentlemen walked in the library and I assume told Judge Pacht we were there because he came out and all of us went into the library.

The Referee: What night was that?

A. That would be the evening of February 28th, as closely as I can remember it.

Mr. Wolver: Q. Was a conversation had there, Mr. Dienstag?

A. Yes, there was an extensive conversation.

Q. Give us the substance of that conversation?

A. I think Sol Zemansky commenced the conversation by stating, "Judge, we would like to get this attachment removed." Judge Pacht said, "That's easy, just pay the amount we sued for."

(Testimony of Edward Dienstag.)

Sol said, "We haven't enough ready cash for that, as you already know, and we came to see whether we can arrange to take care of it some other way." Judge Pacht said, "Well, what do you propose to do?" Sol said, "Well, we could secure your money for you or part of it." Judge Pacht said "How?" and Sol said, "Well, we could give you our pledges as security for fifty per [718] cent of the money we owe you," and Judge Pacht said, "What do you mean?" Sol said, "Well, Mr. Dienstag here is Sam Kleinman's son-in-law, you know Sam Kleinman. His son-in-law is an attorney and he could explain it to you." Judge Pacht said, "Well, Mr. Dienstag, what is it?" and I said, "Well, I can't give you the cases on the subject or the law because my notes on that are all in San Francisco where I did my research in the matter." But I said that the general theory behind that transaction is that a pawnbroker in my opinion can assign his pledge tickets, his right to receive the money from the customer, as security for sums which the pawnbroker has loans. Judge Pacht said, "Well, have you checked that thoroughly," and I said I believe that I have; and Judge Pacht said, "Just a moment, please." Then he and Mr. Lyman and Mr. Simon left the office for five or ten minutes. When they returned Judge Pacht said to Mr. Zemansky, "Assuming that can be done, Sol, before we go any further with this matter at all, there is one thing that I have to know." He said, "There is no use

(Testimony of Edward Dienstag.)

entering into any transaction here unless we know your financial condition." He said, "What I want to know is, are you at the present moment solvent or are you not?" Sol said, "I am absolutely one hundred per cent solvent; you don't have to worry about that. Our assets far exceed our liabilities." The Judge then said, "Well, that transaction would be all right, [719] but we want security for all of our money." Sol said, "Well, I think that fifty per cent ought to be enough." He said, "I will liquidate it fast. At any rate," he said, "when this has been liquidated we will give you more security for the balance." After some conversation to that effect, Judge Pacht and Mr. Lyman and Mr. Simon again left the room. When they returned the Judge said, "Sol, my clients will accept that proposition, but there is one other matter to be settled." He said, "That is the question of my fees for the bringing of this action and the preparation of this agreement." Mr. Zemansky, Judge Pacht, Mr. Simon and Mr. Lyman discussed that matter.

Q. When they finished discussing that matter, Mr. Dienstag, was any further conversation had?

A. Yes sir. Judge Pacht said to me, "As you can see, Mr. Dienstag, I am very busy in my library; I have got a case in the Federal Court, which I am preparing to try in the daytime and I am preparing my brief in the evening." He said, "I haven't got the time to go into the matter, the law on this subject or the form of contract." He

(Testimony of Edward Dienstag.)

said, "Will you be kind enough to come in here tomorrow morning and see Mr. Ross in this office and tell him what you know about this, go into the law with him and the form of the contract." I said, "I will be glad to do that provided it is early in the morning because I have rather a busy day tomorrow." I said, "I have to leave town [720] tomorrow night." So he made arrangements for me to meet Mr. Ross the next morning at 8:30 at Judge Pacht's office.

Q. Did that meeting take place? A. Yes.

Q. Was the contract drawn or dictated?

A. Yes, as I recall, after some conversation with Mr. Ross, he called in one of the secretaries and dictated certain provisions of the contract which I suggested, and as I recall, when I left there, Mr. Ross had decided on all of the provisions of the contract, and the only thing that he then needed was the numbers of the pledge tickets which would become part of the contract.

Q. Did you have any conversation with any of the Zemanskys about the necessity of those numbers, the need for those numbers?

A. After leaving Mr. Ross's office, about an hour after that, I went to the Provident Loan and saw Sol Zemansky. He said to me, "Did you meet Mr. Ross?" I said, "Yes, I have just come from there."

Q. Who was present, Mr. Dienstag?

A. I don't think anybody else was present besides—well, not at the beginning of the conversa-

(Testimony of Edward Dienstag.)

tion, but after that started Mr. Kleinman came over.

Q. Well, will you relate the conversation, if you can tell us, when Mr. Kleinman came in?

A. Just after I had told Mr. Zemansky I had just come [721] from Mr. Ross's office, Mr. Kleinman came over and Mr. Zemansky said to me, "When will the contract be ready?" I said, "It shouldn't take long to type it except for the pawn-ticket numbers, that is, the pledge ticket numbers." I said, "I will have to put them in." I said, "By the way, you select the pledges and get the numbers probably tomorrow afternoon." Mr. Zemansky said to me, "When are you going?" and I said, "I am leaving this evening; I have a reservation on the 6:00 o'clock train." He said, "Well, Ed, couldn't you stay over until this is all finished?" I said, "No, I can't, I must be in San Francisco tomorrow morning without fail." He said, "Can't we get this contract out sooner?" I said, "The only way to get it out soon is to get those numbers of the pledge tickets to Mr. Ross." Mr. Zemansky then turned to Sam and he said, "Sam, why couldn't we give him a drawer of your pledges and get those numbers so this can be completed while Eddie is here;" and Sam turned to me and he said, "Well, Ed, can we do that?" I said, "Yes, as long as we replace them with other pledges." Sol said, "Well, Sam, is that all right?" Sam said, "Ed is handling this; it is up to him." I said, "That will be all right, Sol, as

(Testimony of Edward Dienstag.)

long as you put the loan back, replace the pledges which you take." Sol then called Mr. Leo Kravitz and told him to take a drawer of those pledges and get the numbers off a drawer of Kleinman's, and get the numbers right over [722] to Mr. Ross, so that they could be put in the contract, and as soon as he had gotten the numbers over there to start selecting pledges to replace the pledges that were taken from the Kleinman drawer. And those numbers, I am not certain whether I took those numbers over to Mr. Ross or whether they were sent over there, but they got over there in a very short time, as soon as they were copied off the Kleinman tickets, that is, that box of pledges, and about 5:00 o'clock of that day Kravitz had finished selecting the new pledges for Kleinman and had given me the numbers, which I took over to my office here in Los Angeles and handed to Mr. Horn, I think it was, to have copies for me for the basis of a new contract.

Q. Referring to this conversation, do you recall anything additional in this conversation?

A. Evidently I departed from the conversation to carry out these pawn-ticket numbers, but there was undoubtedly more said.

Q. May we have the balance of it?

A. Sam had agreed to take this substitution of pledges, I said to Sol, "Of course, you know, Sol, we will have to make a record of the substitution of pledges somehow; I think the way to do would

(Testimony of Edward Dienstag.)

simply be to draw a new note for the amount of the pledges and a new contract, we can have that done right away." Sol said, "Well, Sam, we have collected some money for you already; do you have [723] to have that money or could we borrow it." He said, "We can use it to loan out for new pledges, business is pretty good." Sam turned to me and said, "Well, how about that, Ed?" I said, "Well, don't ask me, it's your money, whatever you want to do with it." I said, "If you loan them that money, we will just have to have security for it;" and while I was saying that Dave Zemansky came in and he said, "Well, Sam, if you have got any more money, we could use some fresh money, we could use quite a bit of money." He said, "We would like to borrow some" and Sam again turned to me and said, "Well, how about that, Ed?" I said, "I can't advise you about loaning the money; it is your money, you do with it as you want to, but if you are going to allow them to borrow money that they have been taking in and you are going to give them any new money, there is only one way that I see that the transaction can be handled." I said, "Any money that you give them must be loaned out on new pledges," and Sol said, "That is what we want it for; of course, it will be loaned out on new pledges." I said, "In addition to that, all of the pledges that come in the Provident will have to come to secure you"; so at that Dave said, "These pledges coming in, they are going to be your security." I said, "If

(Testimony of Edward Dienstag.)

your are going to give them money, you get all of the pledges coming to you.”

Mr. Chotiner: Was that in the presence of Sol [724] Zemansky?

A. And Dave Zemansky. Sol said, “Well, whichever way is the proper way to handle it, that will be all right.” I said, “That’s the only way I know.” Dave Zemansky said nothing. Sam then said, “All right, Sol, you can use the money that you have taken in.” I said, “In that event, I will include that in this new contract that we are drawing up.” Later on, while I was at the office in regard to this contract, I got a telephone call with regard to including another sum of money in this contract, a cash sum of money. I don’t recall the exact amount, but it was \$1200 and some odd dollars. The final contract that I drew up that day, which included the substitution of the pledges, the sums which had been collected up to that time, and this new money, was \$25,920, I believe. I think that sum is right.

Mr. Wolver: Q. Mr. Dienstag, will you tell us what [725] happened later that day in regard to the Simons’ contract?

A. It was about 5:00 o’clock when I went to call for Mr. Kleinman at the Provident Loan Association. Mr. Sol Zemansky was there and he said, “Are you leaving on that 6:00 o’clock train?” and I said “Yes, I plan to, Sol.” He said, “I would like you to stay; we will call up Mr. Ross and see how far he has gotten.” Mr. Zemansky called up Mr.

(Testimony of Edward Dienstag.)

Ross or I did, at his request, I don't recall which, and learned Mr. Ross was just completing the contract and the listing of those numbers, and asked Mr. Ross whether we could not complete that contract that evening. I think Mr. Ross said he didn't want to work that night, he would rather do it the next day. I explained to him that Sol wanted to sign it that night and that he wanted me to be here, so Ross agreed to come over later that evening. He said he wanted to check the numbers which he had been given against the pledges and the pawn-tickets, that is, before signing the contract. Then I think Mr. Zemansky said something to him about getting rid of the Sheriff and Mr. Ross said he had orders to do that only when the contract had been signed. Arrangements were made for Mr. Ross to come over to the Provident Loan after dinner that evening, and I canceled my reservation on the 6:00 o'clock train and changed to the 9:00 o'clock. Ross came over; Mr. Lyman and Mr. Simon came over. Some time that evening Mr. Abe Zemansky and Mr. Dave [726] Zemansky were there; Mr. Sol Zemansky was there, I was there and Mr. Kleinman was there.

Q. Was it finished that evening?

A. Well, we started checking those numbers, that is, the numbers on those little pledge envelopes and the numbers on the pawn-tickets with the numbers that Mr. Ross had on the contract, and about 8:00 o'clock or thereabouts when I was about ready

(Testimony of Edward Dienstag.)

to leave for my train, they had only gotten to a third or halfway through. Mr. Zemansky asked me to remain until that contract was signed. I said, "Well, I can't take any other train, I don't know what I will do," and I think he said, "Can't you take a plane?" I said I would call up and I got a reservation for the 11:00 o'clock plane, and then I continued with the comparing of those numbers, which was not completed before it was time to catch the bus at the Biltmore for the plane. I again changed my reservation to the 1:00 o'clock plane. Before 12:00 o'clock we had finished comparing the pledge tickets. I recall at one time or another they would open up one of the pledge envelopes, take out a piece of jewelry and see whether or not that piece of jewelry was the same as the item called for on the pledge ticket. On one occasion Mr. Simon came away from where they were selecting these things, and I think it was either Leo Kravitz or Sam Kleinman that he asked whether a ring which had been pledged for \$300, what the value was, and [727] one of those gentlemen told him it was worth at least a thousand dollars, and Mr. Simon said, "Gee whiz, they are doing a wonderful business around here; they loan you \$300, get three per cent on that, and get a thousand dollars to secure the money they loaned." That continued, as I say, until they finished shortly before twelve, at which time I went over to the Biltmore and got the bus for the plane.

(Testimony of Edward Dienstag.)

Q. Do you recall, Mr. Dienstag, if anything was done in regard to the contract of February 24th on this evening?

A. Yes, I remember I sent my copy to Los Angeles, and when I got to Los Angeles on the morning of the 28th I also brought the notes and Mr. Dave Zemansky and Mr. Abe Zemansky were there, so I asked them to sign them and they did, but Mr. Abe Zemansky said, "Well now, does that make us personally liable?" I said, "Of course it does." He said, "Well, do you mean my life insurance would go on this." I said, "That all depends; I don't know how much life insurance you have got; life insurance has a certain exemption under the laws of the State and also the Federal Government, and anything in excess, if it became necessary to sue on this, the balance would be subject to this contract." Then Mr. Abe and Dave Zemansky signed the contract and notes, and at that time I believe it was then I gave them the other notes.

[728]

Cross Examination

By Mr. Chotiner: [736]

Mr. Wolver: Q. Will you answer the question? A. What was it, please?

(Question read as follows: "Q. Now, from your experience as an attorney and from your knowledge of the services rendered, what in your opinion is the reasonable value of the services rendered by counsel for the claimant?").

A. \$15,000. [738]

EUGENE L. WOLVER,

called as a witness on behalf of the claimant, having been first duly sworn, testified as follows: [740]

Q. Now, have you formed an estimate of the reasonable value of services rendered in this case?

A. I have. [742]

Q. Will you answer?

A. In my opinion the reasonable value is \$10,000. [744]

RALPH J. YATES,

recalled as a witness on behalf of the Claimant, having been previously sworn, testified as follows:

Direct Examination [751]

Q. Are you acquainted with what constitutes a bookkeeping system? A. I am.

Q. What are the essentials of a bookkeeping system?

Mr. Chotiner: Objected to on the ground that it is immaterial.

The Referee: Overruled. [752]

A. To clearly reflect the operation of the business, that is, the receipts or revenue, the disbursements or expense or capital investment, books that would properly reflect a correct picture of the financial condition of the business, particularly the assets and the liabilities, the inventory of the assets, either at the beginning of the year or at the end

(Testimony of Ralph J. Yates.)

of the year, or a perpetual inventory from day to day or month to month. As a result of my examination of the books of the bankrupt, there was no record maintained of the assets or the liabilities, the operation expenses, the net worth and inventory of the assets, and no record of cash reconciliations, nor a record of bank account reconciliations. It was strictly a memorandum record. They would enter the amount of their deposits and the amount of pledges redeemed, amount of new pledges. For example, if I.O.U.'s were issued, there was no record of the I.O.U.'s, there was no record of the amount of cash in the drawer, there was no record of any reconciliation of the amount of cash in the bank. From the books and records of the bankrupt, the bankrupt could not, nor an auditor could not, determine whether or not the business was making money or losing money, and could not determine whether or not the assets were greater than the liabilities, could not determine whether or not they were solvent or insolvent without making an extensive audit and preparing a report of all operations to arrive [753] at a profit or loss for any given period.

Q. What is the meaning of the terms "in balance" or "in control" when applied to accounting?

A. In balance is, the assets should equal the liabilities plus any surplus or minus any deposits.

(Testimony of Ralph J. Yates.)

A balance sheet should reflect either the profit or the loss of the operation at any given period.

Q. In proper bookkeeping, may a balance sheet be obtained from the books from time to time?

A. In proper bookkeeping a balance sheet could be obtained from the books in a very short time.

Q. Could a balance sheet have been obtained from the books that were maintained by Zemansky Brothers? A. No sir.

Q. What is the meaning of control?

A. By control, for example, we have here Sam Kleinman and other parties that were holding notes. If we had a control of the notes payable, we could take the individual accounts and add them up and they would be in control with the notes payable account. Without that control, in this same memorandum book or in any memorandum book, a sheet could be inserted or could be taken out that would not be in control because you have no control. Without the control you don't know from your books whether or not you owe yourself money or whether you owe more than your memorandum books show. [754]

Q. Have you computed at my request the amount of redemptions, pledges secured to Mr. Kleinman by pledge agreements that were redeemed over the period of February 24th until the filing of the petition in this matter? A. I have.

Q. What is the amount of that?

(Testimony of Ralph J. Yates.)

A. The amount of \$44,915. [769]

Q. Mr. Yates, do you know the amount of money that was loaned out by the Zemansky Brothers or the Provident Loan Association between the 24th day of February, 1939, and the date of the filing of the petition in this case?

A. I do.

Q. How much is that?

A. \$55,120.37. [783]

Cross Examination

By Mr. Chotiner:

Q. When you say that \$55,120.37 was loaned out on new loans between February 24, 1939 and the date of the filing of the petition, are you able to determine the source of the money that was used for those new loans; yes or no?

A. No, not from the record of the bankrupt.

Mr. Chotiner: I have no further questions.

The Referee: Any other questions.

Redirect Examination

By Mr. Wolver:

Q. Have you made any search to determine the source of any of the money, Mr. Yates?

A. Yes, I examined the books of the bankrupt, and from the books of the bankrupt I am unable to determine the source of the money. [784]

KYLE Z. GRAINGER,

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

The Referee: Your name is Kyle Z. Grainger?

The Witness: Yes.

Direct Examination

Mr. Chotiner: Q. What is your business or occupation?

A. I am an attorney-at-law.

Q. How long have you practiced in the Federal Court of the Southern District?

A. Twenty-seven years.

Q. During that period of time, have you had any experience in bankruptcy matters?

A. A great deal.

Q. During what period of time has that experience extended?

A. During all of that time, twenty-seven years.

Q. During the twenty-seven years approximately, can you tell us how many bankruptcy matters you have handled, either as attorney for claimant or for the trustee? [786]

A. It would be many hundreds.

Q. Have you handled matters concerning secured claims in bankruptcy? A. Yes.

Q. And has that been a great number of them?

A. Yes.

Q. Now, Mr. Grainger, assuming that a creditor by the name of Sam Kleinman, had entered into a contract dated February 24, 1939, with Zemansky Brothers, who were later adjudged bankrupts, in-

(Testimony of Kyle Z. Grainger.)

volving a \$100,000 obligation, and which contract provided for certain security to be given to the creditor, and assuming further that subsequent to February 24, 1939 that other contracts were executed by and between the parties covering the same subject matter, and which contracts took the place of part of the obligation contained within the \$100,000, excepting that it increased the sum to, say, \$108,000 instead of the \$100,000, and assuming that Zemansky Brothers were subsequently adjudged bankrupts, and assuming further that the Trustee in Bankruptcy filed an objection to the claim of Mr. Kleinman contending in part that the claim of Sam Kleinman was unsecured, and that the security allegedly given to him was invalid, and further assuming that the Trustee further claimed that there were offsets to the claim of Sam Kleinman on account of certain alleged usury, and assuming further that the attorneys for the claimant performed [787] services as testified to by them, and which testimony will now be read to you by the reporter, what in your opinion is the reasonable value of the services so rendered by the attorneys for the claimant? Now, will the reporter read the testimony of Mr. Dienstag and Mr. Wolver pertaining to the services rendered by them in connection with this matter?

Mr. Miller: We object to that question on the ground that it does not include all the elements

(Testimony of Kyle Z. Grainger.)

of services. The question does not set forth the amount of time that has been spent in the matter.

Mr. Dienstag: It does not state the amount of the claim filed by the claimant against the bankrupt estate.

Mr. Chotiner: Q. And assuming further, Mr. Grainger, that the amount of the claim is approximately \$127,000, and assuming further that there is ample security as claimed by the claimant to fully pay the entire security if allowed by the Court.

Mr. Dienstag: And the amount of the offset which you claim.

Mr. Chotiner: Q. And further assuming that the Trustee is claiming offsets in the sum of approximately—and assuming further that the offsets as claimed by the Trustee, if the Trustee is successful, would reduce the claim to a general claim in the amount of approximately \$59,000, and assuming further that one of the grounds of [788] the objections of the Trustee is that certain preferences were guaranteed, in favor of Sam Kleinman——

Mr. Wolver: I believe twenty-two were alleged.

The Referee: While counsel is looking that up, we have another matter.

(A short interruption on another matter.)

(Testimony of Kyle Z. Grainger.)

Mr. Chotiner: Q. Assuming further that the preferences alleged by the Trustee amount to approximately twenty in number, and total approximately \$50,000, what in your opinion is the reasonable value of the services rendered by the attorneys for the claimant?

The Referee: Is there further objection?

Mr. Wolver: May we reserve our right to object until after the reporter has finished the question.

The Referee: If you have any objection now, let's have it.

Mr. Wolver: We would like to have included that the usury question pertains to treble damages both before and after the change of the Usury Act.

The Referee: I think you should state the objection is made on the ground of usury; for instance, it starts with a certain time and continues up to a certain time, and that treble damages are claimed in a certain amount.

Mr. Chotiner: Q. And assuming further, Mr. Grainger, that the contention of the Trustee is that usury was [789] obtained to the claimant beginning with 1935 up to and including the date of the filing of the petition, July 10th, 1939; that in the contention of the Trustee as to usury the Trustee contends that the total usurious payments amounted to approximately \$27,000, and that in addition thereto the Trustee seeks to offset the claim by an addi-

(Testimony of Kyle Z. Grainger.)

tional sum of \$15,000, and by virtue of his contention that he is entitled to offset treble damages for usury paid during one year prior to the filing of the petition.

Mr. Wolver: May there be added to that that the claimant denies the existence of usury as a matter of fact and law, denies the existence of any preference as a matter of fact and law, and asserts the validity of his claim.

Mr. Chotiner: Q. Assuming further that the claimant objects to every objection and every contention that the Trustee has raised in this matter.

Mr. Wolver: With the exception of \$100.

The Referee: Anything else you think of? Now, what is it you want the reporter to read?

Mr. Chotiner: I would like to have him read the testimony of Mr. Dienstag and Mr. Wolver covering the services they testified to they rendered in the matter.

The Referee: Together with the cross examination, if any.

Mr. Dienstag: I think there should be added that the fees which we are asking for include the fees for four [790] attorneys and gives it as the attorneys for the claimant.

The Referee: Let's incorporate that in the question.

Mr. Chotiner: So incorporated.

The Referee: Don't read any testimony given by any person as to the value of those services.

(Testimony of Kyle Z. Grainger.)

(Whereupon the testimony of Mr. Dienstag and Mr. Wolver was read).

Mr. Chotiner: Do you have the question in mind now? A. I think so.

Q. Will you tell us what in your opinion is the reasonable value of the services rendered by the attorneys for the claimant? What is your opinion?

A. In my opinion, I will place the value of the services at \$8,000.

[Endorsed]: Filed Aug. 12, 1942. [791]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF EXCERPTS
FROM PROCEEDINGS ON HEARING
ARGUMENT ON CERTIFICATE ON PE-
TITION OF SAM KLEINMAN FOR RE-
VIEW OF REFEREE'S ORDER OF JAN-
UARY 17, 1941.

Appearances:

ISAAC PACT, Esq.,
THEODORE HORN, Esq.,
LOUIS MILLER, Esq.,
EUGENE WOLVER, Esq., and
EDWARD B. DIENSTAG, Esq.

For Petitioner.

MURRAY CHOTINER, Esq., and
FRANK WELLER, Esq.

For Trustee. [796]

Los Angeles, California,

Friday, July 18, 1941, 10:00 A. M.

The Court: Gentlemen, there is quite a voluminous record here and I thought that I might inquire whether the outline I am about to state epitomizes the legal picture as it is presented on this review.

An order should be entered that the reporter attend this hearing.

The case of *In re Abraham Zemansky et al.*, is a bankruptcy proceeding which originally was begun under Chapter XI on July 10, 1939. Subsequently an order of adjudication in bankruptcy was entered. Among the claims filed against the bankrupt estate was one filed by Sam Kleinman covering the following items: \$126,421.61 as a secured claim; \$350 as an unsecured claim; and an additional claim of \$750 unsecured, but for which priority was asserted as a labor claim.

The trustee filed objections against the first item, contending that at most it was an unsecured claim. He also objected to the so-called labor claim as having any priority, * * *.

Following an extended hearing before the referee, the [797] latter has made his findings and conclusions to the effect that Mr. Kleinman be allowed a general unsecured claim in the amount of \$109,643.69, * * *, and there is a further item of \$100 which the referee found that the claimant owed to the bankrupts, making a total unsecured claim as

allowed by the referee in the amount of \$85,222.68. In addition, the referee allowed the priority labor claim in the sum of \$75.81.

Perhaps I ought to interrupt here to inquire whether up to this point we are substantially in accord.

Mr. Pacht: I think we are.

Mr. Chotiner: I believe that is correct, your Honor.

The Court: The next statement I am about to make appears to me to be an outline of the facts to the extent that they are substantially without controversy.

For a number of years the bankrupts were engaged in the business of pawn broking. For a period of time they had a place of business on Main Street in this city known as State Loan Office. Subsequently, they established an additional place of business on Hill Street known as Provident Loan Association. Mr. Kleinman began lending money to the bankrupts either in 1925 or 1927. I don't think it is of any moment which year is correct. These loans were made at the rate of 12 per cent interest per [798] annum, and until the making of the agreement to be hereafter noted, these loans were unsecured. Likewise, all loans made by Mr. Kleinman prior to 1933 apparently had been repaid prior to that year. And in the latter year Kleinman resumed lending money to the bankrupts. Prior to November 6, 1934, the

date of the so-called 10 per cent usury constitutional amendment adopted in this state, he had advanced to the bankrupts sums totaling \$30,500. These were evidenced by promissory notes executed by the bankrupts and bearing interest at the rate of 12 per cent per annum.

In 1935 in consideration of loans made by Kleinman to the bankrupts, they executed and delivered to him four notes aggregating \$19,500.

In that same year the establishment conducted under the name of Provident Loan Association was opened on Hill near Seventh. About that time Kleinman entered the employ of the bankrupts at that location. While there appears to be a dispute as to the complete nature of his duties, he apparently did work for the bankrupts, performing one task or another, and he was given space in that establishment. In 1936 the total amount owing by the bankrupts to Kleinman aggregated \$50,000. About July 1st of that year notes evidencing this indebtedness were canceled and new notes, ten in number, were executed and delivered by the bankrupts to Kleinman, each in the principal sum of \$5,000, and bearing [799] interest at 12 per cent per annum.

In November of that same year the bankrupts borrowed an additional sum of \$20,000 from Kleinman. This was also evidenced by a note or notes bearing interest at 12 per cent per annum. In 1938 the bankrupts borrowed from Kleinman an addi-

tional \$25,700 evidenced by four notes which bore interest at 7 per cent per annum.

Up to February, 1939, no security had been given on any of this indebtedness. Under date of February 24, 1939, Kleinman and the bankrupts entered into a certain written agreement which is one of the exhibits forming a part of the record on this review, and it is this agreement and the acts of the parties following its execution which on the one hand claimant asserts supports his contention that his claim in the item of some \$100,000 is secured, and which, on the other hand, the trustee asserts supports the referee's findings to the effect that such claim was not secured.

Up to this point are we also in accord?

Mr. Pacht: Yes; we are, except that your Honor has omitted to mention—you may have it in mind—that between 1934 and February 24, 1939, Kleinman loaned to the Zemansky brothers on I.O.U.'s sums varying in amount from \$100 to \$15,000 from time to time, no interest being specified in the I.O.U.'s, and that some of these I.O.U.'s were repaid in cash while others were replaced by notes which in turn were [800] all consolidated on February 24, 1939, and went to make up the total sum of \$100,000 at that time.

The Court: I take it that there is no controversy about that statement.

Mr. Chotiner: There is no controversy, your Honor, except as to any conclusion that might be

drawn as to the fact that no interest was specified in the I.O.U.'s. In other words, if Judge Pacht meant by that that a piece of paper, the I.O.U. didn't have any writing on it regarding usury, I accept that statement as to the subject of interest.

Mr. Pacht: That is right.

The Court: Now, turning to this agreement, in substance it provided that the parties were desirous of securing the indebtedness owing to Kleinman, and accordingly the bankrupts agreed to transfer certain pledge agreements and pawn tickets, more particularly enumerated in an instrument marked Exhibit A attached to the contract. By that agreement the bankrupts purported to transfer these pledge agreements and pawn tickets to Kleinman, and in addition, Kleinman appointed the bankrupts as his agents to collect the sums owing on the pawn tickets. Bankrupts obligated themselves to collect such sums and hold the same in trust for the payment of the notes evidencing the indebtedness owing to Kleinman. In addition, the bankrupts agreed to retain all of the articles pledged under the pawn tickets and pledge agreements and to surrender them to customers [801] who had borrowed money thereon, only upon redemption according to law, and that any articles remaining after the expiration of the time limited for the redemption of the same were to be held by the bankrupts for the benefit of Kleinman. The notes evidencing such indebtedness, were 20 in number, each for the principal sum of \$5,000, and each bore interest at 10 per cent.

At the same time that this agreement was executed, the articles covered by the pawn tickets and pledge agreements were assembled and put in containers separate from other articles which had been pawned with the bankrupts and which were not involved in this agreement, and those containers were placed in a vault belonging to the bankrupts. The containers were marked with the letter "K" for the purpose of designating the same as being the articles covered by the pawn tickets and pledge agreements referred to in the agreement. At the same time a duplicate, or, rather, duplicate ledgers were prepared setting forth the accounts represented by these pawn tickets and pledge agreements, and in these ledgers entries were made from time to time as customers made payments on the pledges and pledge agreements.

Up to March 1, 1939, the bankrupts kept separate and segregated moneys collected by them on pawn tickets and pledge agreements covered by this contract, and entries were made crediting the amounts thus collected against the [802] indebtedness owing by the bankrupts to Kleinman.

About that date a change appears to have taken place in the dealings between the parties, at least to this extent: Orally, bankrupts were advised by Kleinman that they might use the moneys collected on these pawn tickets and pledge agreements for the purpose of making further loans to their customers, and that instead of reducing the indebted-

ness owing to Kleinman through the application of the moneys thus collected, they would be allowed to, in effect, exchange redeemed pawn tickets and pledge agreements for new pawn tickets and new pledge agreements obtained from the customers to whom these new loans would be made; and so from time to time subsequent to March 1, 1939, additional notes were executed by the bankrupts in favor of Kleinman. These notes vary in amount from \$1500 to \$4,600. The total amount thus collected from and after March 1, 1939, and reloaned by the bankrupts for which these additional notes were given amounted to \$39,130. I think I should make this correction: That from time to time as these pawn tickets were redeemed—referring now to pawn tickets listed in the exhibit attached to the contract of February 24, 1939—they were replaced by other pawn tickets. Endorsement was made on some of these notes which had been executed simultaneously with this contract, the endorsements being for amounts which were equal to the new notes. However, I am not clear about one item. Isn't it also [803] true that in addition to such endorsements there was an increase in the indebtedness owing from the bankrupts to Kleinman in the amount of \$8,350?

Mr. Pacht: That is correct.

Mr. Chotiner: That is correct.

Mr. Pacht: Those loans were made between May 2, 1939, and July 10, 1939.

The Court: Up to this point are we substantially in accord?

Mr. Chotiner: No; this is one time that we must take exception, if the court please, as to the points related by the court. There is a dispute as to the testimony that up to March 1, 1939, the bankrupts kept the money separate that was received as a result of redemption of loans from customers, and that the amount of that separate account equaled \$39,130, it being our contention that all of the money that came in from the transactions started after the February 24, 1939, contract and that all of the money collected went in the cash drawer without any segregation of the money. And there is also a dispute as to the points stated by the court that after March 1, 1939, about that date, that Mr. Kleinman told the bankrupts orally that they could use the money to make new loans, and that a system would be worked out whereby they would exchange the pawn tickets which had been redeemed for subsequent pawn tickets that would be received in the course of their [804] business, it being our contention that from February 24, 1939, that whenever redemption of pawn tickets was made that that money went directly into the cash drawer and was used generally in the business of the concern there.

The Court: At any rate, with those two exceptions may I inquire whether you are in accord?

Mr. Chotiner: Other than those two points, I

believe that the trustee's position is that we are in accord with what your Honor has stated.

Mr. Pacht: We think that the court has correctly stated the facts in every particular.

The Court: May I put it this way: You agree that there is an issue on the two exceptions noted by counsel?

Mr. Pacht: I didn't know until a few minutes ago, but I realize there is one now, your Honor.

Mr. Chotiner: There is no doubt in our mind that there is an issue on those two points.

Mr. Miller: May I inquire as to whether there was an agreement? Do you admit that the parties had such an agreement?

Mr. Chotiner: No. We do not admit that such an agreement was actually in existence by and between the two parties. A certain conduct by the parties is admitted, but we deny that the contract, that is, referring to the oral contract of March 1, 1939, was actually in existence as a contract. [805]

The Court: Do you agree that additional notes and agreements purporting or attempting to accomplish these additional pledges for the purpose of securing those additional notes were entered into between the parties subsequent to March 1, 1939?

Mr. Chotiner: Yes; we agree as to that, your Honor.

[Endorsed]: Filed Feb. 9, 1942. [806]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF EXCERPTS
FROM PROCEEDINGS ON ARGUMENT
ON PETITION OF SAM KLEINMAN FOR
REVIEW OF REFEREE'S ORDER OF
JANUARY 17, 1941.

Appearances:

ISAAC PACT, Esq.,
THEODORE A. HORN, Esq.,
EUGENE L. WOLVER, Esq., and
LOUIS MILLER, Esq.

For Petitioner.

FRANK J. WELLER, Esq., and
MURRAY M. CHOTINER, Esq.

For Trustee. [808]

Los Angeles, California

Monday, July 21, 1941

The Court: Am I correct in understanding that counsel for the claimant has not challenged counsel for the trustee to give us the precise references to the reporter's transcript respecting the evidence to which he referred?

Mr. Pacht: Well, we do not agree with the statement of counsel as to several matters; for instance, the statement of Yates' testimony is not, in our view, correctly stated. There are quite a number of matters to which he had adverted where he has made no statement that the transcript brings out or

substantiates the statement that counsel has made. It has been more in the nature of argument than a recital of facts.

The Court: Well, right there, let me ask this: Is there any evidence to the effect that notice of the alleged assignment was sent to the customers?

Mr. Pacht: No.

The Court: Is there some evidence supporting the assertion that the same method of collecting from the customers was continued by the bankrupts after the contract of February 24, 1939, was executed?

Mr. Pacht: Well, that is a mixed statement of fact and law. The customers still came to the Zemansky place of business to make their payments on their loans, but when the payments were made notation of the fact was made in the [809] case of a pawn, a pledge that had been assigned to Kleinman, in his separate books and records.

The Court: That, I understand, is admitted, but is there any other evidence to indicate any change in the method of collection?

Mr. Pacht: I don't think so.

The Court: Now, with respect to Kleinman's right to make collections.

Mr. Pacht: I think he had an absolute right to make collections. There is nothing in the contract that barred him from doing so.

The Court: In other words, the contract is silent, but your position is that, as a matter of law, he could step in, if he chose?

Mr. Pacht: That is right, if both parties found it more convenient to do it the other way.

The Court: And as far as the outside world was concerned, no one recognized any change?

Mr. Pacht: That is right.

The Court: So far as the keeping of the books and records respecting these pledges and the redemption thereof, other than the additional bookkeeping, by keeping a duplicate set for Kleinman, was there any change?

Mr. Pacht: Yes. There were daily slips given to Kleinman of collections that had been made on his pledges.

The Court: Now, does that summarize the evidence as [810] to the change in the bookkeeping methods, namely, that the bookkeeper compiled a duplicate set of records, a duplicate of what had been the customary method?

Mr. Pacht: Yes. And Kleinman himself kept a record, and there was a duplicate ledger set up, and Kleinman himself kept a record of the redemptions that were made.

Mr. Chotiner: Based on the slips that Zemansky brothers had given him.

Mr. Pacht: That is right.

The Court: Is there a conflict in the evidence as to how the moneys received from redemptions were kept in the cash drawer?

Mr. Pacht: The physical fact was that the money received from redemptions was placed in the cash drawer, but we claim upon the distinct under-

standing, lived up to by the Zemansky brothers, that that money was to be used for the sole purpose of reloaning and repledging.

The Court: Do you concede that cash that came in on the pledges that had been assigned to Kleinman was commingled with cash that came in on other pledges?

Mr. Pacht: Yes.

The Court: Now, was there any provision in this contract of February 24, 1939, which authorized Kleinman to terminate the bankrupt's power of collection?

Mr. Pacht: I do not recall. I don't think there is any specific provision to that effect. But we contend that, [811] as a matter of law, a power given, unless it is coupled with an interest, or unless there is an express provision to the contrary, may be terminated at any time. There was no such provision in the contract.

The Court: Then is there evidence to the effect that no payments were made to Kleinman out of moneys collected on account of the redemptions?

Mr. Pacht: In cash, payments of cash to him from redemptions?

The Court: Well, let us first answer that question.

Mr. Pacht: No.

The Court: But you think payments were made——

Mr. Pacht: Except in one instance. I think there is testimony to the effect that there was \$2400

of interest paid to him in cash. That represents the contract of July 5th. And he in turn reloaned it to the Zemanskys on the security of new pledges.

The Court: But there is a conflict even as to that?

Mr. Pacht: I don't know of any conflict as to that.

Mr. Chotiner: There is testimony of Dave Zemansky to the effect that he didn't have 24 \$100 bills, and he did not give them to Mr. Kleinman, and did not receive them back from Mr. Kleinman in the afternoon or any other time. I believe that is the testimony of Mr. Dave Zemansky.

Mr. Pacht: If there is any question about it, I will refer to page and line of the transcript. [812]

The Court: Now, then, you say that there is evidence, however, of payments to Kleinman, not through the medium of cash, but through some other form?

Mr. Pacht: Well, in this way: When redemptions were made they were reloaned by Zemansky brothers pursuant to this understanding, and then they had this bookkeeping transaction that counsel has adverted to, that I expect to dwell on in my closing argument, if I may, but I can do so at this time.

The Court: I don't want to go into it at length. I really want to clarify in my own mind your respective positions. Would this be a correct statement of the position taken on behalf of Kleinman,

now, that from time to time payments to Kleinman on account of redeemed pledges were credited on some of these notes, and in turn new notes executed to evidence the fact that on the one hand payments had been made on account of the old notes, but new loans made, as evidenced by the new notes?

Mr. Pacht: That is right.

Mr. Chotiner: I believe that is substantially correct.

The Court: I take it that the trustee probably will insist that there was that form of payment made. Otherwise you would be in the dilemma of having to pay both the old notes and the new notes.

Mr. Chotiner: We do not want to find ourselves in a dilemma. We plan to place the claimant in one. [813]

The Court: Now, is it conceded that the combination to the vault was never given to Kleinman?

Mr. Pacht: To the outside door. But I want to call the court's attention to this: There was a grill gate, and after you opened the main door to the vault, to which Mr. Kleinman did not have access, after that was opened there was still another grilled door to which he did have a key.

The Court: Alone?

Mr. Pacht: Yes.

The Court: Exclusively?

Mr. Pacht: Not exclusively.

Mr. Chotiner: That was a key kept for all employees, so they might have access to all the drawers,

but I believe it is a true statement that he couldn't get through the grill door without first having the combination to the vault. Is that right?

Mr. Pacht: That is right.

The Court: Let me see if I follow you in this statement: That portion of the vault to which Mr. Kleinman was given access, was that set aside exclusively for his pledges, or were there other articles in there, pledges and so on, to which the Zemansky brothers and their employes had access?

Mr. Pacht: The only property, so far as this case is concerned, that was in the vault, was the pawns themselves, the pawn tickets. The evidences of the pawns were not in [814] the vault at all.

Mr. Chotiner: Am I correct, Judge Pacht, when I say that all pawns that were there were the pawns of Simons and Gans and others?

Mr. Pacht: That is right. They were all there, and were segregated in the vault, those given to Kleinman, those given to Gans, those given to Simons, and those held by the bankrupts themselves. They were segregated and placed in different parts of the vault.

Mr. Chotiner: Once you got past the grilled door you had access to all of those?

Mr. Pacht: That is right. But none of the pawn tickets or the record of their assignment were in the vault. That is correct, isn't it?

Mr. Chotiner: I don't know what the testimony discloses as to where they were kept at night.

The Court: Was there any change in the method of redemption of pledges as maintained by the bankrupts after the execution of this contract of February 24, 1939, as compared with the method prior thereto?

Mr. Pacht: Except that the numbering was broken up, that is, there were different numbers assigned to the various pledges held by Kleinman. There was a different record of them kept.

Mr. Chotiner: I believe the testimony shows that after the Kleinman security was given, they simply ordered [815] a duplicate stub, and that they went then into a new serial number, 50,000, but they didn't keep a special set of serial numbers for Kleinman than others, but they went to a new serial number in point of time. Is that correct?

Mr. Pacht: That is my understanding. When you speak of the same method of redemption of pledges, I take it that you simply mean by that that the borrower would come in to Zemanskys and put down his money on the counter, and somebody there would go into the vault and find the pawn, and give it back to him? Isn't that what you mean?

Mr. Chotiner: Substantially that is it.

The Court: On the other hand, you could readily distinguish the so-called Kleinman pawned articles from all the others?

Mr. Chotiner: No, not unless you first went to the binder which contained the stubs of pawn tickets, and they were numbered numerically, and by looking in first one and then another, if it

wasn't there, then you would go to where the Kleinman numbers were, to find if it was there. That was the way they determined whether it was a so-called Kleinman pledge or one that Zemansky brothers had assigned to somebody else. You would have no way of knowing whether that was a Kleinman pledge or not. You would have to go to the binder and see which book it was in, for the purpose of finding out if it was a so-called Kleinman pledge.

The Court: Now then, was there a conflict in the [816] evidence as to whether or not the method of placing pledges in shoe boxes had prevailed prior to the Kleinman transaction?

Mr. Pacht: I will let Mr. Horn answer that, your Honor. He is a good deal more familiar with the actual procedure than I am.

Mr. Horn: With regard to that, there was testimony by Mr. Kleinman that after the security transaction one of the other employes, Mr. Kravitz, from time to time indicated these shoe boxes as containing new loans and referred to them as being Kleinman's loans, and asked Kleinman to get them. Mr. Dave Zemansky did testify that even before the security transaction pawns were being kept in shoe boxes, but the testimony we refer to in connection with the shoe boxes was that after the security transaction, when the pawns were put in shoe boxes as they came in, that the loan clerk, Kravitz, indicated to Kleinman that when those shoe boxes with his pawns in had accumulated an amount of

several thousand dollars worth, a contract would be drawn up as to those. Although there is a conflict in one sense, that they did keep them in shoe boxes before, there is no conflict with regard to the fact that after the security transaction the pawns were set aside in these shoe boxes by Kravitz and accumulated for Kleinman.

Mr. Chotiner: He says accumulated for Kleinman. I don't believe there is testimony to that effect, our [817] contention being that the same method of using shoe boxes was in use before and after.

Mr. Horn: I can locate for the court the exact pages of the reporter's transcript covering that matter.

The Court: Well, if you will do so.

Mr. Chotiner: I can give your Honor our citations right at this point. Page 614, line 14, to page 615, line 15.

The Court: Mr. Reporter, will you repeat that?
(Record read by the reporter.)

The Court: I take it we are agreed that the pawns were never transferred to Kleinman?

Mr. Pacht: That is right.

The Court: Now, other than what was incorporated by the language of the contract of February 24, 1939, are you agreed that the possession of the pawn tickets was never transferred?

Mr. Pacht: No. We definitely claim the record is otherwise. There was an actual physical transfer of the pawn tickets. I have the record on that.

The Court: First of all, we will ask counsel for the trustee to give us his references.

Mr. Chotiner: I will have to run through these pages of my notes to find that one, but I will get it very shortly. I have this one notation right here, that the stubs containing Kleinman pledges were kept in the same place as [818] other stubs, but in separate boxes. Reporter's transcript, page 306, lines 1 to 7. Then I will find others as I run through this.

The Court: Well, while counsel is searching for them, maybe you can give me the information a little later, and I will turn to the next item. Is it conceded that at least there was a conflict in the testimony respecting the point that Kleinman followed the same procedure as the bankrupts in handling redemptions of pledges?

Mr. Pacht: I think that is a fair statement, your Honor.

The Court: And did he follow the same procedure as the bankrupts in all matters pertaining to the pledges?

Mr. Pacht: I don't know what is meant by that.

The Court: Did his conduct differ from that of any other employe?

Mr. Pacht: As to the pledges?

The Court: As to the handling of the pledges as they were redeemed.

Mr. Pacht: In so far as the customer is concerned, there was no change whatever. As far as his rights were concerned, there was a definite variation.

The Court: That is, by the use of this duplicate ledger and the furnishing by the bankrupts of the slips?

Mr. Pacht: Yes.

The Court: Of the daily redemptions, to Kleinman? [819]

Mr. Pacht: Yes, and a recognition by the bankrupts that as to those pledges Kleinman had rights which they were recognizing.

The Court: That is, by virtue of the fact that they endorsed credits on the old notes and issued new notes?

Mr. Pacht: And also that they consulted him and told him whenever redemptions were made of his pledges and how much the redemption was, and in other instances asked his express permission to repledge some of his pawn tickets to other creditors.

The Court: Is there any evidence to the contrary?

Mr. Chotiner: The evidence shows that he did get permission to use the pledges for the Gans and Simons contracts.

The Court: To that extent he exercised dominion?

Mr. Chotiner: That is right.

The Court: Over certain pledges?

Mr. Chotiner: He gave his permission for the use of them.

Mr. Pacht: More than that, Mr. Chotiner. The Zemanskys asked his express permission, and he gave his permission, and made it physically possible for them to pledge those particular pawn tickets to Simons and Gans.

Mr. Chotiner: As I understand your statement, it includes a little argument, and I can't quite agree with it.

Mr. Pacht: Will you also stipulate with me that they [820] distinctly asked his permission?

Mr. Chotiner: I will if the testimony so shows, but he unquestionably gave his permission as far as the use in the Gans and Simons transactions. As I recall the testimony, there was some testimony about how they were going to do it, and there is some doubt in my own mind whether Kleinman volunteered that they could do it, but in any event they did use them.

The Court: In addition, would you agree, Mr. Chotiner, that from time to time slips of the redemptions, of the record of these redemptions, were furnished by the bankrupts to Kleinman, and in turn credits would be endorsed on some of the old notes, purporting to show that they had applied the moneys collected on those redemptions toward the payment of some of the notes, and, in turn, new notes were given from the bankrupts to Kleinman, to the extent of the moneys thus collected, as evidence of the bankrupts' recognition that those were moneys which they were borrowing anew from Kleinman?

Mr. Chotiner: We will concede that substantially that is what happened, although in point of time the notations of credits on the old notes were not simultaneously with the handling of the slips of the redemptions. And, further, we do not concede as a matter of law that the new notes were given to

indicate new moneys borrowed from Kleinman, because in reality they were not new moneys. With those [821] exceptions, we agree with your Honor's statement.

I have another citation on that question of where the pawn tickets stubs were kept. Page 305, line 14 to line 26.

The Court: Is there a conflict in the evidence as to whether or not the substitution of new pledges for old pledges as the latter were redeemed was done simultaneously?

Mr. Pacht: There is no conflict that it was done within two or three days, and sometimes as late as a week after the money came in from the redemptions.

Mr. Chotiner: That is substantially correct.

The Court: Now, when you say that Kleinman permitted the bankrupts to use the funds obtained from redemptions of pledges, do you mean that there is a conflict in the evidence as to whether or not that was done on the condition that the moneys thus obtained would be credited on old notes and new notes executed to evidence such use?

Mr. Chotiner: Yes, we do contend there is that conflict by virtue of the testimony of the witnesses to the effect that after the February 24, 1939, contract, that the money received from redemptions went into the cash drawer and was used again for the purpose of reloaning, and by virtue also of the contention and testimony of the claimant that it wasn't until March 1, 1939, that they entered into an oral agreement whereby this could be done.

The Court: Let me see if I follow you. Is it your [822] position that there is evidence to this effect, that between February 24th and February 28th inclusive, 1939, moneys were collected upon the redemption of pledges which had been assigned under the contract of February 24, 1939, and those moneys not only commingled with other moneys which had to do with such pledges, but that employes of the bankrupts forthwith, during those few days, used those moneys to loan to other customers, without consulting Mr. Kleinman about it?

Mr. Chotiner: Yes, your Honor.

Mr. Horn: I would like to have your reference to any page in the transcript where that appears. On that point, while Mr. Chotiner is looking for it, I would like to call the court's attention to the fact that Mr. Kleinman testified very definitely about the fact that Sol Zemansky told him he had this money for him, and wanted to re-borrow it. There was no rebuttal of that point whatsoever. Mr. Sol Zemansky, who was available, was not called to deny that he told Kleinman he had \$4,000 collected and he wanted to re-loan it. The only testimony on the point by Mr. Sol Zemansky occurred at page 208 of the transcript where, on cross examination, he was asked whether he didn't recall telling Mr. Kleinman that he wanted to borrow the money that was collected and Sol Zemansky said, "I don't recall." He didn't say, "No, we have already used it." He merely said, "I don't recall." I have other testimony of Mr. [823] Kleinman and Mr.

Dienstag on that point, and there was no rebuttal whatever. I would like to call the court's attention further to the fact that I am pretty sure the record shows that after the contract of February 24th was executed Mr. Kleinman went to San Francisco, and didn't come back until February 27th or March 1st.

Mr. Chotiner: Substantially that is the situation. The testimony was not directly limited as between February 24th and February 28th, but, rather, both before and after the security was given, was money put in the cash drawer and re-loaned. I think we are in agreement as to what the evidence is.

The Court: What days of the week fell during this period of February 24th to March 1st, 1939? I have here a calendar for the year 1939, which shows that February 24th fell on a Friday, which would mean that the 25th was on a Saturday, and the 26th was on a Sunday, and the 27th on Monday and the 28th on a Tuesday. Now, does the evidence show without contradiction that throughout that period, other than Sunday, that the bankrupts continued to do business?

Mr. Chotiner: Yes, that is right.

Mr. Pacht: Yes.

The Court: Is the evidence also without contradiction that on February 24, 1939, Kleinman left Los Angeles?

Mr. Chotiner: I think the testimony shows that on [824] February 27th he was in San Francisco. As to the date he left Los Angeles, frankly, I don't recall what the transcript does show. I know it shows that on the 27th he was in San Francisco,

and received a long distance telephone call from Sol Zemansky, telling him of the attachment.

Mr. Pacht: Do you recall any evidence on that point?

Mr. Horn: I don't believe there was any specific reference to the date that Mr. Kleinman left Los Angeles.

Mr. Miller: He left on the 25th.

Mr. Pacht: You mean that the record shows that he left on the 25th?

Mr. Miller: Yes.

The Court: Well, I will suggest that counsel at some later time ascertain the exact reference in the record about that. In other words, what I am seeking to ascertain is, does the record show here, or will it justify an inference that Kleinman was aware of the fact that the bankrupts were using the funds obtained from redemptions of pledges supposedly assigned to him in the same manner after the signing of the contract of February 24, 1939, as had been practiced prior to the making of that contract, or did the bankrupts, without his knowledge, violate the agreement and proceed to abuse their rights in the matter, or violate his rights.

Mr. Pacht: We think the record will bear out this fact, that the bankrupts recognized his right to a segrega- [825] tion of those moneys and were not utilizing them for their own purposes between the 24th of February and the 1st day of March, and that they had segregated some \$4,000.

Mr. Chotiner: Do you contend that there was an actual segregation between February 24th and March 1st?

Mr. Pacht: Yes.

Mr. Chotiner: We would inquire, through the court, for the citations in the transcript that show the actual segregation.

Mr. Pacht: Mr. Zemansky was supposed to do it and told Kleinman that he did do it.

Mr. Chotiner: Is there any testimony in the record which shows that they actually did physically segregate that money, or are you relying on the statement testified to by Mr. Kleinman that that is what Sol Zemansky told him he did.

Mr. Pacht: That is right. And there is no testimony to the contrary.

The Court: On the other hand, as I suggested a moment back, I would be interested to know whether Kleinman was aware of how the bankrupts were loaning the moneys collected on the redemption of the pledges following the signing of this contract.

Mr. Pacht: We will try to locate whatever testimony there may be in the record on that.

Mr. Chotiner: We will do likewise. [826]

The Court: In other words, if he was in the place of business it might justify an inference that he did know what was going on. Of course, if he left on the same day the contract was signed and didn't return until March 1st, that might put another aspect on the situation.

Mr. Pacht: The record discloses at page 524 of the transcript—is that Kleinman's testimony?

Mr. Horn: That is Kleinman's testimony.

The Court: 5 what?

Mr. Pacht: Page 524, commencing at line 22. It shows that he left for San Francisco the very same night that the contract of February 24th was signed. There is no question about it, that he was going there the same night that the contract was signed, which was on February 24th, and that he did not return until after the levy of the Simons attachment.

Mr. Chotiner: Except let me point out to the court that Mr. Kleinman left the same night that Mr. Kleinman testified that Abe Zemansky signed it. In the testimony at least there is a conflict. In any event the testimony shows that Sol Zemansky first signed the contract in San Francisco the same day or the day following his arrival at the Hotel St. Francis, and the date of his arrival at the Hotel St. Francis is fixed as February 22nd. There is testimony in the record to the effect that Abe Zemansky and Dave Zemansky signed the contract the same night that [827] the Simons people were at the Provident Loan Association, which was after the attachment was run, and the attachment was run on February 27th, so, therefore, if Mr. Kleinman is referring to the night that Abe Zemansky signed, he would have to be referring to a time subsequent to February 27th.

Mr. Miller: He was in San Francisco and received a telephone call.

Mr. Chotiner: I might suggest that during the noon recess, if I have an opportunity to run through the transcript more carefully, I may be able to find another citation that will help clear up the point.

Mr. Pacht: Mr. Wolver is calling my attention to another citation showing that he was in San Francisco during that time. We will try to find all the appropriate parts of the transcript dealing with this subject, but I think your Honor will find that immediately after the contract of February 24th was signed Kleinman left for San Francisco, and did not return until after the levying of the Simons attachment, which was done February 27th. He didn't return until the 28th.

Mr. Chotiner: And it is our contention that the date of his leaving Los Angeles is not definitely fixed by the testimony, because there are inconsistent references to points of time, but we will endeavor to find more specific citations.

The Court: All right. [828]

Mr. Chotiner: Point 16. Judge Pacht challenged the authority in the record, that we couldn't tell from what source the money came, which is point 16. We find that Mr. Yates was unable to determine from what source the money came for the making of the new loans from February 24, 1939, to the date of the filing of the petition, and that is contained in the reporter's transcript, page 784, lines 3 to 18.

Mr. Pacht: What Yates testified to was that he couldn't determine that from the records of the bankrupts, but from the testimony of the bankrupts it is determinable. In other words, they had no other money coming in, there was no other source of funds except Kleinman for the making of loans during that period.

Mr. Chotiner: You don't seriously contend that the Zemanskys were not receiving money, got no money from any source other than redemptions?

Mr. Pacht: I expect to demonstrate to the court that between February 24, 1939, and the date of bankruptcy, the only moneys that went out for loans were something like \$55,000, and that at least \$51,000 of that came from redemptions of pledges theretofore given to Kleinman, plus approximately \$8,000 new money supplied by Kleinman from other resources.

Mr. Chotiner: All of which money was commingled with whatever other funds the Zemanskys had.

Mr. Pacht: Yes. Well, the difference doesn't amount [829] to very much, and of the total amount of loans made by them during that intervening period about 96 per cent came from Kleinman's funds.

The Court: Well, as I understand it, when we resume Senator Weller will take up another point. My present thought is that there are certain portions of the reporter's notes that I would like to have transcribed. They include the following: The

statement made by the court at the outset of the argument. Then the colloquy that has taken place between the court and counsel this morning following the conclusion of Mr. Chotiner's argument.

Mr. Pacht: Concerning the time of Mr. Kleinman's arrival in San Francisco, I would like to call the court's attention to the testimony of Dienstag appearing on page 713, commencing with line 21, and the whole of page 714, which shows that Kleinman arrived in San Francisco on the morning of February 25th.

(Whereupon a recess was taken in this matter until 2:45 p.m., Monday, July 21, 1941.)

[Endorsed]: Filed Feb. 9, 1942. [830]

[Title of District Court and Cause.]

PETITION OF SAM KLEINMAN FOR EXTENSION OF TIME TO DOCKET APPEAL

Comes now your Petitioner, Sam Kleinman, a claimant and appellant in the above entitled matter, and respectfully represents:

That he filed a Notice of Appeal herein on the 8th day of July, 1942; that pursuant to the rules of Court he filed his Designation of Contents of Record on Appeal; that on the 13th day of August, 1942, the Clerk of the United States District Court for the Southern District of California wrote to your petitioner's attorney, stating that certain of

the material designated as part of the contents on appeal could not be prepared within the forty days allowed for docketing of appeals, stating that it would be necessary to have an extension of time to docket the appeal; that your petitioner's attorney, Edward Dienstag, Esq., was on vacation and did not receive said letter until the 17th day of August, 1942; that the 17th day of August, 1942, is the last day for docketing said appeal; that your petitioner is informed and believes that fifteen days will be sufficient time to complete the material necessary for said appeal.

Wherefore, your petitioner prays that this Honorable Court make its order extending the time to docket the said appeal to and including Tuesday, the 1st day of September, 1942.

Dated: August 17, 1942.

SAM KLEINMAN.

[Endorsed]: Filed Aug. 18, 1942.

[Title of District Court and Cause.]

ORDER

Upon reading the petition of Sam Kleinman for an Order Extending Time to Docket Appeal, and good cause therefor appearing, it is hereby ordered that the time to docket the appeal in the above

entitled matter is hereby extended to and including Tuesday, the 1st day of September, 1942.

Dated: August 17, 1942.

FRANCIS A. GARRECHT,
U. S. Circuit Judge.

[Endorsed]: Aug. 18, 1942.

[Endorsed]: No. 10236. United States Circuit Court of Appeals for the Ninth Circuit. Sam Kleinman, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy of the estate of Abraham Zemansky, David Zemansky and Sol Zemansky, doing business under the fictitious names and styles of Provident Loan Association and State Loan Office, Bankrupts, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 1, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10236

SAN KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, as Trustee of the Estate
of ABRAHAM ZEMANSKY, DAVID ZE-
MANSKY and SOL ZEMANSKY, doing busi-
ness under the fictitious names and styles of
PROVIDENT LOAN ASSOCIATION and
STATE LOAN OFFICE,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

To: Paul P. O'Brien, Esq., Clerk of the above
entitled Court; and to Paul W. Sampsell, and
to Frank C. Weller, Esq., and to Murray M.
Chotiner, Esq., his attorneys:

You, and Each of You, will please take notice
that Sam Kleinman, the appellant in the above
entitled appeal, intends to rely upon the following
points:

(1) That portion of the Order of The Judge on
Petition for Review of Referee's Order dated June

8, 1942, which adjudges and decrees that the claim of Sam Kleinman is a general unsecured claim and not a secured claim, is contrary to the law and is not supported by the evidence.

(2) That the District Court erred in making that portion of its Order, dated June 8, 1942, adopting and approving the following Findings of Fact of the Referee, for the reason that the same are against the law and not supported by the evidence:

(a) That on February 24, 1939, and for some time prior thereto, and continuously thereafter, Sam Kleinman had reasonable cause to believe, and did know, that the bankrupts, as co-partners, and as individuals, were insolvent.

(b) The pledge agreements, pledge property and pawn tickets remained in the possession and under the control of the bankrupts.

(c) That the money received from the customer would be placed in the cash drawer and used again in the business of the bankrupts, without segregating it in any manner.

(d) The moneys received as a result of the redemption of pledges by customers became a part of the general funds of the bankrupts, and that Sam Kleinman had full knowledge of this procedure and acquiesced to it.

(e) There never was a transfer of the pawn tickets or pledges, and that all of the property and assets at all times remained in the exclu-

sive possession and control of the bankrupts, and that Sam Kleinman did not exercise any dominion or control over the pledges or the pledge ticket stubs, except as an employee of the bankrupts.

(f) That the bankrupts at all times had exclusive dominion and control of the pledge ticket stubs and pledges, and that there was not any difference in the handling of the pledges or pledge tickets after they were assigned to Sam Kleinman for security than there was before that time.

(g) That the transfer of the pledges and pledge ticket stubs from the bankrupts to Sam Kleinman was a fiction, and that no actual transfer ever took place.

(h) That the transaction between the bankrupts and Sam Kleinman was an attempt to give Sam Kleinman a more favorable position over other creditors.

(i) That the checks executed by Sam Kleinman's daughter, Jeanette Dienstag, and delivered to the Bankrupts in respect to new notes and contracts, was a subterfuge, as the sums of money indicated were not actually paid to the bankrupts.

(j) That the claimant knew that in 1936 and 1937 there was sufficient money to make loans, and that after that time he knew there was not sufficient money to make all loans re-

quested by customers; and that he also knew that many large loans were refused because the bankrupts were short of capital.

(k) That a duplicate set of pawn ticket stubs were not segregated from the rest of the records of the bankrupts.

(3) That the District Court erred in approving and adopting the following Conclusion of Law of the Referee:

That the assignment of pledge tickets and pledges from the bankrupts to Sam Kleinman was void as against creditors of the bankrupts and as against the Trustee in bankruptcy.

(4) That the District Court erred in making its order adjudging and decreeing that the said claim of Sam Kleinman is a general unsecured claim (rather than a secured claim).

(5) That the District Court erred in failing to find that the claim of Sam Kleinman was a secured claim in the sum of \$108,350.00, plus interest accrued at the date of the proof of claim, i.e., the 14th day of February, 1940, together with interest at the rate of 10% from and after said 14th day of February, 1940.

(6) That the District Court erred in failing to find that the claimant was entitled to reasonable attorneys' fees in this matter by virtue of his security agreement.

Dated: Sept. 5, 1942.

EDWARD DIENSTAG, THEO-
DORE A. HORN and LOUIS
MILLER,

By EDWARD DIENSTAG,
Attorney for Sam Kleinman,
Claimant and Appellant.

Receipt of a Copy of the within Statement of
Points is hereby admitted thisday of
....., 1942.

.....
.....
Attorneys for Paul W. Samp-
sell, Trustee in Bankruptcy
and Appellee.

[Endorsed]: Filed Sep. 5, 1942.

[Title of Circuit Court of Appeals and Cause.]

Upon reading the application of the appellant,
Sam Kleinman, for an order eliminating from the
printed record Kleinman's Exhibit No. 6, consist-
ing of a ledger book containing certain numbers
and dates, and considering said Exhibit in its origi-
nal form, and good cause appearing therefor,

It Is Hereby Ordered that said Kleinman's Ex-
hibit No. 6 be eliminated from the printed record

herein and that said Kleinman's Exhibit No. 6 be considered in its original form.

Dated: September 8th, 1942.

CURTIS D. WILBUR,

Senior United States Circuit
Judge.

[Endorsed]: Filed Sep. 8, 1942.

7

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of
the estate of Abraham Zemansky, David Zemansky and Sol Zemansky, doing business under the fictitious names and styles of Provident Loan Association and State Loan Office, Bankrupts,

Appellee.

SUPPLEMENTAL
Transcript of Record
(SUMMARY OF ASSETS AND LIABILITIES
OF THE BANKRUPTS.)

VOLUME III
Pages 587 to 599

FILED

FEB 25 1943

PAUL P. O'BRIEN,
CLERK

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

No. 10236

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of
the estate of Abraham Zemansky, David Ze-
mansky and Sol Zemansky, doing business un-
der the fictitious names and styles of Provident
Loan Association and State Loan Office, Bank-
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Appellee.

SUPPLEMENTAL
Transcript of Record
(SUMMARY OF ASSETS AND LIABILITIES
OF THE BANKRUPTS.)

VOLUME III
Pages 587 to 599

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

In the United States District Court, in and for
The Southern District of California

Central Division

No. 34490-H

In the Matter of ABRAHAM ZEMANSKY, DA-
VID ZEMANSKY and SOLOMON ZEMAN-
SKY, doing business under the fictitious names
and styles of PROVIDENT LOAN ASSOCIA-
TION and STATE LOAN OFFICE,

Debtor.

DEBTORS' SCHEDULE OF CREDITORS

RECAPITULATION

Creditors holding securities	\$ 31,928.29
Creditors who claim to be secured.....	156,568.51
Other creditors holding securities.....	18,400.00
Unsecured creditors—all holding promissory notes for money borrowed	1,111,397.00
Unsecured creditors—Notes payable—Merchandise	7,287.32
Due to employees—wages and salaries.....	707.06
Open accounts payable—Goods, wares and mer- chandise, rents, public utilities, etc.....	6,525.22
Schedule of unsecured creditors holding outstand- ing checks including bank overdrafts.....	4,885.26
Other accounts payable	Amounts Unknown
Grand Total.....	\$1,337,698.66

United States of America
State of California
County of Los Angeles—ss.

I, Solomon Zemansky, being first duly sworn, de-
pose and say:

That I am one of the members of the firm of Zemansky Bros., transacting business under the names and style of Provident Loan Association and State Loan Office:

That the foregoing and attached schedule of Creditors secured and unsecured is a true and correct statement of schedule and list of creditors according to my best knowledge, information and belief.

SOLOMON ZEMANSKY

Subscribed and sworn to before me this 13th day of July, 1939.

V. I. MacMAHON

Notary Public in and for Said
County and State

[Endorsed]: Filed July 14, 1939.

[Title of District Court and Cause.]

SCHEDULE OF ALL ASSETS OF DEBTOR

1. Real Estate: An undivided one-third interest in Southerly 75 feet of lots 13 and 14. All of lots 17, 18 and 19. Westerly 75 feet of lots 20 and 21. All of lots 21, 22 and 23 . . . Block #1, replats of blocks 1 and 4 of the Vine Cottage Tract as per map recorded in book 59 . . . page 18 Misc. Records of said L. A. County\$ 12,500.00
Note: Property is 185 feet on Los Feliz, 150 feet on Central Ave., 50 feet on Cypress.
2. Cash on hand:..... 1,073.25
3. Bills of Exchange, Promissory Notes or Securities of any description: None except in the form of pledges.

3. Stock in trade as distinguished from pledges:
Located at the State Loan Office, 558 South
Main Street, Los Angeles, California, inven-
toried at \$101,864.22, appraised by appraisers
appointed by the Referee at..... 76,982.90
- 4a. Stock in trade located at the Provident Loan
Association Office, 706 So. Hill St., Los An-
geles, inventoried at 30,499.70, appraised by
appraisers appointed by the Referee at..... 14,047.53
- 4b. In addition to the merchandise shown above,
there are certain items of jewelry on deposit
with sundry creditors held by them as security
to claims aggregating approximately \$18,450.00,
which jewelry has a value of approximately
\$25,737.65, leaving an apparent equity of..... 7,287.65
5. Household goods and furniture, wearing ap-
parel, etc.: None, except as set forth in Sched-
ules filed by the individuals comprising the
debtor.
6. Books, prints, pictures: None.
7. Horses, cows, sheep and other animals: None.
8. Carriages and other vehicles: None.
9. Farming stock and implements of husbandry:
None.
10. Shipping and shares in vessels: None.
11. Machinery, fixtures, apparatus and tools: Fix-
tures and equipment located at Provident Loan
Association, inventoried at \$38,221.75, appraised
by appraisers appointed by the Referee at.....\$ 23,386.50
- 11a. Fixtures and equipment located at State Loan
Office, inventoried at \$12,662.50, appraised by
appraisers appointed by the Referee at..... 8,321.75
- 11b. Furniture and fixtures located at 1527 East
Seventh Street, Los Angeles, inventoried at
\$4,398.91, appraised by appraisers appointed by
the Referee at 1,250.00
12. Patents, copyrights and trade marks: None.
13. Other goods and personal property: None
except as hereinafter listed.

- | | |
|--|------------|
| 14. Pledges claimed to be held as security but in the actual possession of the Receiver—principal amount of pledges only..... | 139,706.35 |
| 14a. Pledges claimed to be held by creditors as security not in possession of Receiver,—principal only | 43,014.80 |
| Note: The validity of the repledges to creditors, whether or not possession changed, is not conceded by the debtor. Reference is made to Schedule of Creditors heretofore filed for full particulars with respect to the names of creditors holding securities and the amount of such creditors' claims. | |
| 14b. Unencumbered pledges at the Provident Loan office, principal only | 33,724.74 |
| 14c. Unencumbered pledges at the State Loan Office, principal only | 29,260.77 |
| 15. Stock in incorporated companies, and negotiable bonds: 31¼ shares of stock in Redondo Properties Corporation, held in trust in name of Burnett Wolfson—Value unknown. | |
| 16. Policies of insurance: None. | |
| 17. Property in reversion, remainder or expectancy, including property held in trust for the debtor; None except as shown in subdivision 15 above. | |

18. In addition to the foregoing list of assets the debtor holds the following:

Interests in outside enterprises which the debtor finds impossible to value at the present time or to make an intelligent estimate of the value, to-wit:

A one-half interest in Club Fortune, located at Reno, Nevada.

A five and one-third (5⅓%) per cent interest in a tango skill game operated at Butte, Montana.

A one-third (⅓%) per cent interest in a card parlor operated in El Cerrito, Calif.

Full details of these enterprises and the interests of the debtor therein have been submitted to the Receiver and explained in detail

by Solomon Zemansky in examination proceedings under 21-a.

Total.....\$390,556.24

ZEMANSKY BROTHERS
By SOLOMON ZEMANSKY

Duly Verified.

[Endorsed]: Filed Aug. --, 1939.

[Title of District Court and Cause.]

AMENDMENT TO SCHEDULE OF
CREDITORS

Comes now Abraham Zemansky, David Zemansky and Solomon Zemansky and by leave of Court first had and obtained, hereby amend their schedule of creditors heretofore filed in the within matter by adding thereto the names of the following unsecured creditors, to-wit:

Name	Address	Amount of Claim
Pearl Hornick		Promissory note in the sum of....\$ 2,000.00
C. A. Hoffman	1123½ Queen Anne Pl., Los Angeles	Promissory notes in the sum of.... 2,000.00

Duly Verified.

Let the within be filed.

August 17, 1939.

ERNEST R. UTLEY,
Referee.

[Endorsed]: Filed Aug. 17, 1939.

[Title of District Court and Cause.]

SCHEDULE OF INDIVIDUAL ASSETS OF SOLOMON ZEMANSKY

1. Real estate	None
2. Cash on hand.....	Less than \$100.00
3. Bills, promissory notes and securities.....	None
4. Stock in trade.....	None
5. Household goods, etc.	None
6. Books, prints and pictures.....	None
7. Horses, cows and other animals.....	None
8. Carriages and other vehicles . . .	
1937 Cadillac 12 cylinder touring sedan, subject to lien in favor of General Motors for an unpaid balance of \$575.43.	
9. Farming stock and implements.....	None
10. Shipping and shares in vessels.....	None
11. Machinery, tools, etc.....	None
12. Patents, copyrights and trade marks.....	None
13. Other personal property . . . Ordinary wearing apparel and matters of adornment claimed to be exempt under the provisions of Sections 690, 690.1 et sec. of the Code of Civil Procedure of the State of California.	
14. Debts due on open account.....	None
15. Stocks, negotiable bonds, etc.....	None
16. Policies of insurance.....	None
17. Unliquidated claims	None
18. Deposits of money in banks and elsewhere.....	None
19. Property in reversion, remainder, trust, etc.....	None
20. Property claimed to be exempt . . . Ordinary wearing apparel and matters of adornment claimed to be exempt under the provisions of Sections 690, 690.1 et sec. of the Code of Civil Procedure of the State of California.	
21. Books, deeds and papers.....	None.

SOLOMON ZEMANSKY,
Petitioner.

Duly Verified.

[Endorsed]: Filed July 31, 1939.

[Title of District Court and Cause.]

SCHEDULE OF INDIVIDUAL ASSETS OF ABRAHAM ZEMANSKY

1. Real estate:

10 acres of land in North Sacramento, Sacramento County, California, free and clear except for taxes accumulated for some 3 or 4 years. Legally described as follows:

All of that certain property situate in the County of Sacramento, State of California, described as the east quarter of the North half of tract 45, as shown on the official plat of Greenwood, filed in the office of the Recorder of the County of Sacramento, State of California, August 17, 1914, in book 15 of Maps, page 10. Estimated value\$2,000.00

All that certain property situate in the County of San Mateo, State of California, described as lot #36, in block #14 of Hillerest, as the same is designated upon the map of Hillerest recorded March 14, 1907 in volume 14, Miscellaneous Records, at page 232 in the office of the County Recorder of San Mateo County. Free and clear except taxes. Estimated value..... 500.00

All that certain property situate in the County of Lincoln, State of Oregon, described as lot 3 in block 39; lots 4 and 9, block 46, Buford's First Addition to Alexandria; lot 12 in block 25; lot 8 of block 29; lots 7, 11 and 12 of block 30; lot 9, block 12; lot 5, block 13, and lot 9 of block 31, Buford's second addition to Alexandria.

Note: No taxes have been paid on this property for many years, and the same is believed to be either lost to the debtor or to have no value above the accumulated taxes.

2. Cash on handLess than \$100.00
3. Bills, promissory notes and securities . . . See Schedule 15, below.
4. Stock in trade..... None

5. Household goods, etc.....	None
6. Books, prints and pictures.....	None
7. Horses, cows and other animals.....	None
8. Carriages and other vehicles.....	None
9. Farming stock and implements.....	None
10. Shipping and sharing in vessels.....	None
11. Machinery, tools, etc.....	None
12. Patents, copyrights and trade marks.....	None
13. Other personal property: Miscellaneous assortment of old fashioned out of date yellow gold jewelry, estimated value	\$ 850.00

Explanatory note: In 1925 debtor was interested with another party in the operation and conducting of a jewelry store at Bisbee, Arizona. During the year of 1925 debtor discontinued his relationship with his partner and in the winding up of their affairs debtor received a miscellaneous lot of jewelry referred to, above, which he still has in his possession. It is possible that the estimated value may be high, by reason of the out of date character of the property.

In or about September, 1938, debtor placed with Gertrude Zemansky (daughter of debtor, who was operating a certain jewelry store in Hollywood), a certain lot of jewelry which actually belonged to the wife of debtor, but which has been treated, nevertheless, as the property of the debtor, and is therefore returned as his property. This merchandise was placed with said Gertrude Zemansky on memorandum, and as of the date of placing had a value of \$1066.00, less cost of mountings furnished by Gertrude Zemansky of \$199.00, leaving a balance of \$867.00. Gertrude Zemansky has paid to debtor the sum of \$596.00, by paying two life insurance premiums for debtor, each for the sum of \$183.00, and by giving debtor the sum of \$230.00 in cash, leaving a balance due to debtor from Gertrude Zemansky, either in merchandise or cash, in the sum of.....

271.00

Ordinary wearing apparel and matters of adornment claimed to be exempt under the provisions of Sections 690, 690.1 et sec. of the Code of Civil Procedure of the State of California.

14. Debtors due on open account..... None

15. Stocks, negotiable bonds, etc.

At the date of the filing of the petition petitioner owned 40 shares of stock in Wayne Pump Company, which was pledged with the Union Bank & Trust Company to secure a loan of \$500.00. The stock was sold by the Bank, and the difference in cash turned over to the undersigned, in the sum of..... 462.28

On the date of the filing of the petition debtor owned the following stock on margin, to-wit: 100 shares New York Central Railroad; 100 shares Real Silk Hosiery; 200 shares Stutz Motors; 40 shares Wayne Pump; 200 shares White Motors. All of this stock was and is in the possession of A. W. Morris & Co., Los Angeles offices in the Union Bank Building, 325 West 8th Street, and was subject to a total indebtedness of \$2818.61 as of July 27th, 1939. Debtor's equity as of July 28, based on market quotations, was..... 2,083.50

This stock account was carried in the name of Gertrude Zemansky, daughter of debtor, and had been so carried since 1933, but in trust, nevertheless, for the debtor.

Debtor holds 100 shares of stock in Columbia Gas, and 100 shares of stock—common—in Warner Brothers. These two blocks were held by the Pacific Company, 623 South Hope Street, and as of July 27, 1939, debtor was advised by the Pacific Company that the credit balance in favor of debtor was the sum of..... 407.74

1 share of Union Oil Company, approximately 18.50

16. Policies of insurance:

The following policies in New York Life Insurance Company:

- 1 policy for \$5000, issued September 10, 1908, #4096-447D, annual premiums \$107.45, cash surrender value \$2055, less indebtedness of \$1891.86, net cash value..... 163.14
- Policy #4001884, issued June 4, 1907, \$3000, annual premium \$92.40. Cash value \$1863 less indebtedness of \$1755.20, net value..... 107.80
- The following policies in the Equitable Life Assurance Society: Policy #2328702, \$10,000. Annual premium \$367.30. Cash surrender value (no loans are against this)..... 6,408.00
- Policy #2328703, \$25,000, issued April 11, 1918. Annual premium \$939.00. Surrender value \$15,531, subject to outstanding loan of \$7075.16, present cash surrender value..... 8,455.84
- Term Policy #10766538, \$25,000. Annual premium \$732.00. This policy has no surrender value.
17. Unliquidated claims None
18. Deposits of money in banks and elsewhere..... None
19. Property in reversion, remainder, trust, etc..... None
20. Property claimed to be exempt: Ordinary wearing apparel and matters of adornment claimed to be exempt under the provisions of Sections 690, 690.1 et seq of the Code of Civil Procedure of the State of California. Such of the policies of life insurance listed above as represent an annual premium of \$500.00.
21. Books, deeds and papers: Only such papers as indicate the ownership of the property scheduled herein.

ABRAHAM ZEMANSKY,
Petitioner.

Duly Verified.

[Endorsed]: Filed July 31, 1939.

[Title of District Court and Cause.]

SCHEDULE OF INDIVIDUAL ASSETS OF DAVID ZEMANSKY

1. Real estate	None
2. Cash on hand.....	Less than \$100.00
3. Bills, promissory notes and securities.....	None
4. Stock in trade.....	None
5. Household goods, etc.....	None
6. Books, prints and pictures.....	None
7. Horses, cows and other animals.....	None
8. Carriages and other vehicles.....	None
9. Farming stock and implements.....	None
10. Shipping and shares in vessels.....	None
11. Machinery, tools, etc.....	None
12. Patents, copyrights and trade marks.....	None
13. Other personal property—Ordinary wearing apparel and matters of adornment claimed to be exempt under the provisions of Sections 690, 690.1 et sec. of the Code of Civil Procedure of the State of California.	
14. Debts due on open account.....	None
15. Stocks, negotiable bonds, etc.....	None
16. Policies of insurance.....	None
17. Unliquidated claims	None
18. Deposits of money in banks and elsewhere.....	None
19. Property in reversion, remainder, trust, etc.....	None
20. Property claimed to be exempt . . . Ordinary wearing apparel and matters of adornment claimed to be exempt under the provisions of Sections 690, 690.1 et sec of the Code of Civil Procedure of the State of California.	
21. Books, deeds and papers.....	None

DAVID ZEMANSKY,
Petitioner.

Duly Verified.

[Endorsed]: Filed July 31, 1939.

District Court of the United States
Southern District of California
Central Division

United States of America
Southern District of California—ss.

CERTIFICATE OF CLERK TO SUPPLEMENTAL TRANSCRIPT OF RECORD

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of a portion of Debtors' Schedule of Creditors, to-wit the Recapitulation and verification, filed July 14, 1939; Schedule of All Assets of Debtor; Amendment to Schedule of Creditors; Schedule of Individual Assets of Solomon Zemansky; Schedule of Individual Assets of Abraham Zemansky and Schedule of Individual Assets of David Zemansky all in the Matter of Abraham Zemansky, David Zemansky, and Solomon Zemansky, doing business under the fictitious names and styles of Provident Loan Association and State Loan Office, Debtor, No. 34490-H—In Bankruptcy, as the same appears from the original record remaining in my office.

I further certify that the fees of the clerk for preparing, comparing, correcting and certifying the foregoing amount to \$9.50 which sum has been paid to me by Appellee.

Witness my hand and the seal of said Court, this
26th day of January, A. D. 1943.

[Seal] EDMUND L. SMITH,
 Clerk,
By THEODORE HOCKE,
 Deputy Clerk.

[Endorsed]: No. 10236. United States Circuit
Court of Appeals for the Ninth Circuit. Sam Klein-
man, Appellant, vs. Paul W. Sampsell, Trustee in
Bankruptcy of the estate of Abraham Zemansky,
David Zemansky and Sol Zemansky, doing business
under the fictitious names and styles of Provident
Loan Association and State Loan Office, Bankrupts,
Appellee. Supplemental Transcript of Record. Upon
Appeal from the District Court of the United States
for the Southern District of California, Central
Division.

Filed February 1, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in
Bankruptcy of the Estate of Abra-
ham Zemansky, David Zemansky and
Sol Zemansky, doing business under
the fictitious names and styles of
Provident Loan Association and
State Loan Office, Bankrupts,

Appellee.

FILED

JAN - 5, 1943

PAUL P. O'BRIEN
CLERK

Opening Brief of Appellant

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In the
United States
Circuit Court of Appeals
For the Ninth Circuit

SAM KLEINMAN,

Appellant,

vs.

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the fictitious names and styles of
Provident Loan Association and
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Appellee.

No. 10236

OPENING BRIEF OF APPELLANT

INTRODUCTION

This is an appeal from that portion of the order of the Honorable Harry A. Hollzer, United States District Judge, dated June 8, 1942* (Tr. 81, 82), which in substance and effect adopts the Findings of Fact,

* (The abbreviation Tr. will be used herein to refer to the Transcript of Record.)

Conclusions of Law and Order of the Referee in Bankruptcy, Honorable Benno M. Brink, in the above entitled matter adjudging the claim of the Appellant to be an unsecured claim. (Tr. 25 to 37.)

Attention is directed to the fact that the Referee allowed offsets for usury in favor of the Trustee. Upon Petition for Review of the Referee's Order, the District Court disallowed the offsets and allowed the Appellant's claim as a general unsecured claim in the sum of \$109,545.73. From this Order, reversing the Referee's Order with respect to claimed offset for usury, no appeal has been taken by the Trustee.

STATEMENT OF JURISDICTION

The Appellant, Sam Kleinman, filed a claim in said bankruptcy proceedings, which are pending in the District Court of the United States for the Southern District of California, Central Division, in the sum of \$127,501.61, composed as follows: \$126,401.61 Secured; \$350.00 Unsecured; and \$750.00 Unsecured, for which a priority claim was filed. (Tr. 7 to 15.)

Objections to said claim and to the security thereunder and asserting offsets to said claim were filed by Paul W. Sampsell, Trustee of the Estate of the Bankrupts in said proceedings. (Tr. 15 to 24.) After a hearing on the issues raised by said Objection, the Referee found in favor of the Appellee. (Tr. 25 to 35.)

From the Order of the Referee dated the 17th of January, 1941 (Tr. 36, 37) Appellant filed a Petition

for Review. (Tr. 37 to 44.) After the Referee's Certificate on Petition for Review (Tr. 44 to 55), the Order of February 17, 1941, was submitted to the United States District Court, and said District Court made its Order, dated June 8, 1942 (Tr. 81, 82), which reversed the Findings of Fact and Conclusions of Law of the Referee as to all offsets for alleged usury, and affirmed that portion of said Order which held the claim of the Appellant to be an unsecured claim, and reversed said Order of the Referee dated the 17th day of January, 1941, with respect to said claimed offsets for alleged usury.

This appeal is brought to review that portion of the final Order of the District Court of the United States for the Southern District of California, Central Division, dated June 8, 1942 (Tr. 81, 82), which adjudges Appellant's claim to be unsecured.

The jurisdiction of this Court to review the Order of the District Court is found in the provisions of Sections 24a and 24b of the National Bankruptcy Act (Title 11, Sections 47 and 48 U. S. C. A.) and Title 28, Section 225c U. S. C. A.

Section 24a provides, "The Circuit Courts of Appeal of the United States . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact. . . ."

Section 24b provides, "such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

It appears on the face of the record that the amount involved in this appeal is more than Five Hundred (\$500.00) Dollars (Tr. 82 and 84).

The jurisdiction of the Referee of the District Court to hear, and allow the objections of the Appellee is found in Sections 23 and 38 of the National Bankruptcy Act, (Title 11, Section 46; Section 66; U. S. C. A.)

Section 23a provides, "The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees. . . ."

Section 23b provides, "Suits by the receiver and trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of defendant, except as provided in Sections 60, 67, and 70 of this Act."

Section 38 provides, "Referees are hereby invested, subject always to a review by the judge, with jurisdiction to . . . (6) perform such of the duties as are by this Act conferred on courts of bankruptcy. . . ."

The jurisdiction of the District Court to review the Order of the Referee is found in Section 39c of the

National Bankruptcy Act. (Title 11, Section 67, U. S. C. A.)

Section 39c provides, "A person aggrieved by an order of a referee may, . . . file with the referee a petition for review of such order by a judge. . . ."

STATEMENT OF THE CASE

For many years prior to the proceeding herein, the bankrupts operated two pawnbroking establishments in Los Angeles, California, to wit: the "Provident Loan Association" and the "State Loan Office." During this period they also owned and operated numerous entertainment enterprises in California, Nevada and Montana.

As early as 1925, Appellant had loaned substantial sums to the bankrupts. These sums had all been repaid prior to 1933. During 1933 and 1934, Appellant loaned \$30,500.00 to the bankrupts. In 1935, he loaned them an additional \$19,500.00.

In 1935, the bankrupts hired the Appellant to work at Provident Loan Association as an expert gem appraiser and salesman. (Tr., p. 441.)

In 1936, the bankrupts borrowed an additional \$20,000.00 from Appellant. In 1938, Appellant loaned them further sums totaling \$25,700.00. These loans totaled \$95,700.00 by the end of 1938, and were evidenced by unsecured promissory notes of the bankrupts.

On February 24, 1939, the \$95,700.00 notes were cancelled (Tr. 111 to 112) and other notes, amounting

to \$3,669.00, of the bankrupts were likewise cancelled, and Appellant advanced cash in the sum of \$631.00. Twenty \$5,000.00 notes, totaling \$100,000.00, were then executed by the bankrupts and delivered to Appellant and an agreement was executed. (Copies of these notes and of the contract of February 24, 1939 (Defendant's Exhibit 4, Tr. 110 to 134), are attached to Appellant's claim.) By the agreement the bankrupts assigned to the Appellant, as security for the repayment of said notes, certain designated and numbered pawn tickets, which the bankrupts had received from their customers, and which represented approximately \$107,000.00 due the bankrupts from those customers. These pawn tickets were in effect promissory notes (Tr. 255 to 260). The agreement provided that bankrupts would act as appellant's agent for collection of the money due on the pawn tickets.

On March 1, 1939, Appellant and the bankrupts entered into an oral agreement by the terms of which the bankrupts were given the right to use the money collected and to be collected on the assigned pawn tickets under the following conditions: that said bankrupts were required to use said collected money only for new loans to their customers; and to substitute the pawn tickets acquired by their loan of Appellant's money as security in the place and instead of the redeemed pawn tickets. (Tr. 224 to 225, 246, 266, 268, 291, 453, 454.)

This agreement was carried out. At intervals of from three days to a week, these replacement pawn

tickets, which had been accumulating, were (in an amount equaling those redeemed), by written agreements, formally assigned to Appellant. (Tr. 291, 317, 338, 364, 377, 433.) New notes were executed in the amount of these redemptions, and the numbers of the new pawn tickets were attached to said agreements. The substitution agreements varied from \$1200.00 to \$4600.00 in amount, depending on the quantity and rate of the redemptions. (Copies of these notes and agreements are attached to Appellant's claim.) Appropriate credit entries were indorsed upon the notes and in the bookkeeping record of the bankrupts. (Tr. 373, 374.) All moneys collected by bankrupts on the pawn tickets assigned to Appellant were in this manner reloaned. (Tr. 246, 266, 268, 291, 292, 315, 507.)

On two different occasions, to accommodate the bankrupts, the Appellant exchanged a portion of his tabulated and assembled pawn tickets for an equal value of others of the bankrupts. (Tr. 319 to 324; 332 to 334; 454, 455, 459, 460.)

In addition to the foregoing, between May 2, 1939, and July 10, 1939, Appellant loaned the bankrupts the additional sum of \$8350.00, which was secured by similar notes, agreements, and pawn tickets (Tr. 547, 554).

Between February 24, 1939, and July 10, 1942 (on which latter date a petition in reorganization was filed by the bankrupts), the money received by the bankrupts from the redemption of the pawn tickets assigned to the Appellant amounting to \$44,915.00

(Tr. 540, 541), and the additional \$8350.00 loaned by Appellant, totaled \$53,265.00. The amount of money loaned out by bankrupts during the same period was \$55,120.37. (Tr. 541.)

THE QUESTIONS INVOLVED

I.

Were the agreements between the appellant and the bankrupts, providing for an assignment of pawn tickets as security, valid and enforceable?

II.

Did the bankrupts have unrestricted and unfettered dominion over the proceeds of the assigned pawn tickets?

III.

Was the estate of the bankrupts diminished by assignments to the appellant?

IV.

Did the appellant as a creditor of the bankrupts have reasonable cause to believe that the bankrupts were insolvent?

STATEMENT OF POINTS RELIED UPON ON APPEAL

Appellant respectfully relies in the appeal before this Court upon Points I, II, III, IV, V and VI, as the same appear in the Transcript of Record, pages 581 to 584, inclusive.

However, in conformity with Rule 20 (d), each of the said errors relied upon are set forth herein in full.

(1) That portion of the Order of the Judge on Petition for Review of Referee's Order dated June 8, 1942, which adjudges and decrees that the claim of Sam Kleinman is a general unsecured claim and not a secured claim, is contrary to the law and is not supported by the evidence.

(2) That the District Court erred in making that portion of its Order, dated June 8, 1942, adopting and approving the following Findings of Fact of the Referee, for the reason that the same are against the law and not supported by the evidence:

(a) That on February 24, 1939, and for some time prior thereto, and continuously thereafter, Sam Kleinman had reasonable cause to believe, and did know, that the bankrupts, as co-partners, and as individuals, were insolvent.

(b) The pledge agreements, pledge property and pawn tickets remained in the possession and under the control of the bankrupts.

(c) That the money received from the customer would be placed in the cash drawer and used again in the business of the bankrupts, without segregating it in any manner.

(d) The moneys received as a result of the redemption of pledges by customers became a part of the general funds of the bankrupts, and that Sam Kleinman had full knowledge of this procedure and acquiesced to it.

(e) There never was a transfer of the pawn tickets or pledges, and that all of the property and assets at all times remained in the exclusive possession and control of the bankrupts, and that Sam Kleinman did not exercise any dominion or control over the pledges or the pledge ticket stubs, except as an employee of the bankrupts.

(f) That the bankrupts at all times had exclusive dominion and control of the pledge ticket stubs and pledges, and that there was not any difference in the handling of the pledges or pledge tickets after they were assigned to Sam Kleinman for security than there was before that time.

(g) That the transfer of the pledges and pledge ticket stubs from the bankrupts to Sam Kleinman was a fiction, and that no actual transfer ever took place.

(h) That the transaction between the bankrupts and Sam Kleinman was an attempt to give

Sam Kleinman a more favorable position over other creditors.

(i) That the checks executed by Sam Kleinman's daughter, Jeanette Dienstag, and delivered to the Bankrupts in respect to new notes and contracts, was a subterfuge, as the sums of money indicated were not actually paid to the bankrupts.

(j) That the claimant knew that in 1936 and 1937 there was sufficient money to make loans, and that after that time he knew there was not sufficient money to make all loans requested by customers; and that he also knew that many large loans were refused because the bankrupts were short of capital.

(k) That a duplicate set of pawn ticket stubs were not segregated from the rest of the records of the bankrupts.

(3) That the District Court erred in approving and adopting the following Conclusion of Law of the Referee:

That the assignment of pledge tickets and pledges from the bankrupts to Sam Kleinman was void as against the creditors of the bankrupts and as against the Trustee in bankruptcy.

(4) That the District Court erred in making its order adjudging and decreeing that the said claim of Sam Kleinman is a general unsecured claim (rather than a secured claim).

(5) That the District Court erred in failing to find that the claim of Sam Kleinman was a secured claim in the sum of \$108,350.00, plus interest accrued at the date of the proof of claim, i.e., the 14th day of February, 1940, together with interest at the rate of 10% from and after said 14th day of February, 1940.

(6) That the District Court erred in failing to find that the claimant was entitled to reasonable attorneys' fees in this matter by virtue of his security agreement.

SUMMARY OF ARGUMENT

I.

An assignment of pawn tickets by a pawnbroker in the State of California, as security for the repayment of an obligation is valid and enforceable.

II.

The validity of the assignments was not affected by the permission granted to the Bankrupts to collect the proceeds and reloan the same upon substitution of equal security, nor did the Bankrupts have unfettered dominion or control over the pawn tickets or their proceeds.

III.

The assignments of the pawn tickets after March 2, 1939, were not preferential for the reason that they were substituted for other pre-existing security and no diminution of the Bankrupts' estate resulted.

IV.

The assignments to the Appellant cannot be deemed preferential for the reason that the evidence does not support the findings of the Referee and the District Court; that on February 24, 1939 (date of first contract of assignment), and for sometime prior thereto and continuously thereafter, Sam Kleinman (Appellant) had reasonable cause to believe and did know that the bankrupts as co-partners and as individuals were insolvent.

ARGUMENT**I.**

AN ASSIGNMENT OF PAWN TICKETS BY A PAWN-BROKER IN THE STATE OF CALIFORNIA AS SECURITY FOR THE REPAYMENT OF AN OBLIGATION IS VALID AND ENFORCEIBLE.

The subjects of the assignment agreements between the appellant and the bankrupts were the pawn tickets (Tr. 113). An examination of a copy of these pawn tickets (Tr. 255 to 260) discloses that it was a promise on the part of the bankrupts' customers to pay to the bankrupts a stated sum of money and as such was a chose in action. A chose in action is defined by the Civil Code of the State of California, Sec. 953, as "A right to recover money or other personal property by a judicial proceeding." Under the law of the State of California a pawn ticket is clearly a chose in action and is enforceible by an action at law.

Mauge v. Heringhi, 26 Cal. 577;

Turney v. Goldberg's Loan Office, 274 Pac. 464, 135 Okla. 147.

It is definitely settled that the validity of a security agreement whenever the same is questioned in bankruptcy must be determined by the law of the State where the contract is made. In the case at bar all of the agreements were made and executed in California and consequently the law of that state governs.

Hiscock v. Varick Bank of New York, 206 U. S. 28; 27 S. Ct. 681; 51 L. Ed. 945.

Section 3440 of the Civil Code of California provides as follows:

“Every transfer of personal property, *other than a thing in action* . . . is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors. . . .” (Italics ours.)

Under this section of the Civil Code, in California an assignment in writing of choses in action is valid and effective without a delivery or a change of possession of the instruments evidencing the obligations transferred. The decisions firmly establish this proposition.

Kirk v. Roberts, 3 Cal. Unrep. 671; 31 Pac. 620;
 Merced Bank v. Price, 9 Cal. App. 177; 98 Pac.
 383;

Burkett v. Doty, 176 Cal. 89; 167 Pac. 518;

Joint Pole Association v. Steele, 213 Cal. 233;
 2 Pac. (2d) 157;

Kent v. Kent, 6 Cal. App. (2d) 488; 44 Pac.
 (2d) 445;

3 Cal. Jur. (Assignments), Sec. 21, p. 265.

II.

THE VALIDITY OF THE ASSIGNMENTS WAS NOT AFFECTED BY PERMISSION GRANTED TO THE BANKRUPTS TO COLLECT THE PROCEEDS AND RELOAN THE SAME UPON SUBSTITUTION OF EQUAL SECURITY, NOR DID THE BANKRUPTS HAVE UNFETTERED DOMINION OR CONTROL OVER THE PAWN TICKETS OR THEIR PROCEEDS.

In approaching this phase of the argument, the attention of the Court is respectfully directed to the case of *Benedict v. Ratner*, 268 U. S. 353; 45 S. Ct. 566; 69 L. Ed. 991. In this case, at page 364, the Supreme Court set forth the guiding principles for the determination of the validity of those security transactions in which the debtor collects on behalf of the creditor the proceeds or liquidation of the security. It was there stated as follows:

“ . . . If the agreement is that the mortgagor may sell and use the proceeds for his own benefit, the mortgage is of no effect, although recorded . . . *but it is only where the unrestricted dominion over the proceeds is reserved to the mortgagor that the mortgage is void. This dominion is the differentiating and deciding element.* . . . ” (Italics ours.)

The theory of the Court is described in the following language at page 363:

“The nature of the rule is made clear by its limitations. Where the mortgagor of chattels agrees to apply the proceeds of their sale to the payment of the mortgage debt or to the purchase of other chattels which shall become subject to the lien, the mortgage is good as against creditors if recorded. . . . The permission to use the proceeds to furnish substitute collateral ‘provides only for a shifting of the lien from one piece of property to another taken in exchange.’ . . . ”

We respectfully urge that under this rule and its elaboration in the cases hereinafter to be cited, the facts of the instant case are such that but one conclusion may be drawn, to wit, that neither unrestricted nor unfettered dominion or control was reserved to the bankrupts under the arrangement with the appellant, but that their conduct in respect to the pawn tickets and the proceeds derived from the collection thereof was definitely circumscribed and limited.

It is our contention that the uncontroverted facts fully show that appellant permitted the bankrupts to use the proceeds of his security solely to furnish substitute collateral and that thereby there was only "a shifting of the lien from one piece of property to another taken in exchange."

We have printed in the Appendix, pages 83 to 145, all of the testimony of the parties, which is materially related to this point. From this evidence, it appears, without question, that the Appellant did not permit the bankrupts to have unfettered dominion or control over the pawn tickets or their proceeds, but in fact, himself maintained such dominion and control as is required under the law.

The elements of restraint imposed by the Appellant are enumerated as follows:

1. Until the time when the agreement of February 24, 1939, was modified by the agreement of March 1, 1939, the bankrupts held all money received under the contract segregated and in trust for Appellant. (Appendix, pages 103 to 105, 116.)

2. The use of money collected by the bankrupts on the contract, after March 1, 1939, was limited solely to reloans upon substituted pawn tickets, all of which were by agreement security for Appellant. (Appendix, 103 to 115, 118 to 120.)

3. After March 1, 1939, it was a continuous duty of the bankrupts to, and they did set aside and accumulate pawn tickets for Appellant in substitution and

replacement of his redeemed pawn tickets. (Appendix, pages 113 to 114.)

4. At frequent intervals, varying from two days to a week, Appellant required the bankrupts to, and they did cause the accumulated pawn tickets to be formally listed and incorporated into written contracts. (Appendix, pages 106 to 108, 110, 111, 113 to 115.)

5. The bankrupts daily accounted to Appellant with reference to the disposition of the proceeds of the assigned pawn tickets, and maintained a permanent running inventory thereof and furnished copies thereof to Appellant. The bankrupts kept a ledger record, a copy of which was furnished by them to Appellant, upon which the bankrupts were required to and did maintain a record of the credits and debits existing between the bankrupts and Appellant. (Appendix, pages 130 to 134, 140 to 144, Plaintiff's Exhibit 5, Tr. 371, 372.)

6. Immediately on the execution of the first contract and continuously thereafter, all of the pawn tickets listed in the contracts between the Appellant and the bankrupts were removed from the binders of the bankrupts and were placed in special binders marked "K" to indicate that they were Appellant's pawn tickets. These pawn tickets were kept separate from the pawn tickets of the bankrupts. (Appendix, pages 97 to 103, 113, 114, 122, 123.)

7. Contemporaneously, the tangible pawns relating to those pawn tickets were segregated, making them

more readily identified and redeemable with relation to the assigned pawn tickets. (Appendix, pages 92 to 97.)

The doctrine of *Benedict v. Ratner*, *supra*, pages 14, 15, does not appear to have been presented to this Court. Its application, however, has received consideration in other circuits, and it appears to be well settled that the contracts and the manner of their performance between the bankrupts and the Appellant are valid.

Clark v. Iselin, 88 U. S. 360; 22 L. Ed. 568;

Sexton v. Kessler, 225 U. S. 90; 32 S. Ct. 657; 56 L. Ed. 995;

Young v. Upson, 115 Fed. 192 (2 Circ.);

Chapman v. Emerson, 8 Fed. (2d) 353 (4 Circ.);

Coppard v. Martin, 15 Fed. (2d) 743 (5 Circ.);

In re Federal Piano Corporation, 37 Fed. (2d) 556 (4 Circ.).

In *Young v. Upson*, 115 Fed. 192 (2 Circ.) at p. 194, it appeared that the bankrupt had delivered to the creditor assignments in writing of its accounts receivable as collateral security. The books of the company indicated the assignment. In determining that the security was valid, the Court stated at page 195 in the opinion, as follows:

“I am unable to perceive how a pledge of bills receivable could have been transferred more ef-

fectively in the absence of a statute requiring notice to be given than was actually done in the case at bar. Separate accounts were carried on the books of the Company. The proceeds of accounts collected were immediately paid to the lender. Requests for renewal notes and extension of time of payment were referred to complainant for his decision. His right of possession is as fully demonstrated as the nature of the security would permit. But it is contended that it is essential to the validity of the transfer that notice should have been given to the debtors whose claims were assigned. This contention is unsound. The necessity for notice by an assignee to the debtor arises where he seeks to protect himself against a payment by the debtor to the original creditor. The debtor is released from liability to the assignee unless he has been notified of the assignment."

In the case of *Chapman v. Emerson*, 8 Fed. (2d) 353 (4 Circ.), the bankrupt assigned to the creditor its accounts which were to be collected by the bankrupt and the proceeds paid over to the creditor. In determining the conflicting claims of the creditor and the trustee in bankruptcy, the Court stated at page 354, as follows:

"The same individual was a representative of the appellees and an active officer of the bankrupt. When the latter collected assigned accounts, it did not always turn over the proceeds to the appellees. In fact, it usually replaced the collected accounts by others of later date. In some in-

stances, it is probable not even so much was done. The relations between the bankrupt and the appellees were such that what they did was more significant than what they said they were going to do. The referee and the learned District Judge were right in critically scrutinizing their transactions. In the result, however, they united in the conclusion that the assignment was made in good faith for present consideration, and that, although the appellees had not always insisted on the full measure of their rights, they had never intended to surrender, and had not in fact surrendered, to the bankrupt anything approaching 'unfettered dominion' over the accounts or their proceeds."

In *Coppard v. Martin*, 15 Fed. (2d) 743 (5 Circ.), defendant lent the bankrupt, a corporation, \$4500.00 for the purpose of purchasing certain outstanding stock, and under an arrangement whereby the defendant was made manager of the business, and that his loans should be repaid out of the first proceeds from the sale of the goods of the corporation. In an action brought by the trustee in bankruptcy attacking the validity of the transfer the Court declared, at page 745:

"We are of opinion that a valid lien was created. The pledge of accounts receivable of a mercantile business creates a lien, though such accounts be retained and collected by the pledgor, and substitutions of future accounts be authorized. *Van Iderstine v. National Discount Company*, 227 U. S. 575; 33 S. C. T. 343; 57 L. Ed. 652; *Sexton v. Kessler*, *supra*.

“However, if the pledgor is not required to make substitutions, but is authorized to use the proceeds of accounts as he sees fit, no lien exists. *Benedict v. Ratner*, 268 U. S. 353; 45 Supreme Court 566; 69 L. Ed. 991. A pledge of accounts receivable being sufficient to create a lien, we think it must follow by analogy that a pledge of money received from the sale of goods is also sufficient for that purpose, for the principle is the same. The necessity of surrender of dominion by the pledgor applies to the tangible property, but it does not apply to a pledge of indebtedness. See *Young v. Upson* (C. C.), 115 Fed. 192, cited with approval by the Supreme Court in *Benedict v. Ratner*, *supra*. Consequently, Article 4000, Texas Revised Civil Statutes, which in effect makes void a lien upon a stock of goods exposed for sale in the regular course of business, where possession and control remain in the owner of the goods, has no application to the pledge of accounts receivable or proceeds from the sale of goods.

“Martin’s lien was not lost by reason of his failure to reimburse himself out of the first moneys received from the sale of goods. The acquiescence of the corporation that he reimburse himself out of later receipts amounted to a substitution, and did not result in any injury to the general creditors represented by the trustee.”

In the case of *in re Federal Piano Corporation*, 37 Fed. (2d) 556, (4 Cir.), it appeared that the bankrupt assigned to the defendant certain conditional sales contracts and leases as security, the agreement providing that the bankrupt should collect the install-

ments due and apply them upon the notes at sixty day intervals. The Court sustained the validity of this transaction, stating as follows at page 556 of the opinion:

“The trustee insists, however, that this transaction was fraudulent in law *because the bankrupt was permitted to continue to collect the installments due and to mingle the same with its own funds without accountability until the end of each of the sixty day periods, and the referee has held with him, and both rely upon Benedict v. Ratner, 268 U. S. 353; 45 Supreme Court 566, 567; 69 L. Ed. 991.* I have examined that case carefully, with the result that I find it dependent upon wholly different facts from the case at bar. In that case, there was an assignment of accounts receivable as in this. ‘The receivables were to be collected by the company. Ratner was given the right, at any time, to demand a full disclosure of the business and financial conditions; to require that all amounts collected be applied in payment of his loans; and to enforce the assignment although no loan had matured. *But until he did so, the company was not required to apply any of the collections to the repayment of Ratner’s loan. It was not required to replace accounts collected by other collateral of equal value. It was not required to account in any way to Ratner. It was at liberty to use the proceeds of all accounts collected as it might see fit.* The existence of the assignment was to be kept secret.’ *The difference between those facts and those which are shown in this case are obvious. Here the bankrupt was*

required to apply all collections made within every sixty day period to the curtailment of the note, and, while it is true it had the use of the money collected between the date of collection and maturity of the notes, it was as of the latter date required to pay it over in payment of the curtail, and as between the two every dollar collected was ear-marked for the specific purpose mentioned.

. . .

“The test in all such cases seems to be whether the assignor retains unfettered dominion over nominally assigned accounts and their proceeds. If so, the assignment is fraudulent. Otherwise it is not.

“I cannot say the evidence here shows such ‘unfettered dominion’ over the accounts or their proceeds, and I find myself therefore obliged to reject the conclusions of the referee and reverse the order entered by him.” (Italics ours.)

From these decisions, the following propositions are clearly enunciated:

1. A creditor may take an assignment of choses in action, notes, bills due, or accounts, as security for an obligation under an agreement whereby his debtor is substituted as an agent for the purpose of collection.

2. Adequate “fettering” of the debtor exists in law if he must, upon collection or at agreed periods, account to the creditor for the collected proceeds, and pay the same or substitute other security in lieu thereof. Measured by these criteria, it is respectfully sub-

mitted that the contracts and the conduct of the appellant and the bankrupts, fall well within these rules, and are valid and bind the 'Trustee in Bankruptcy.

III.

THE ASSIGNMENTS OF THE PAWN TICKETS AFTER MARCH 2, 1939, WERE NOT PREFERENTIAL FOR THE REASON THAT THEY WERE SUBSTITUTED FOR OTHER PRE-EXISTING SECURITY AND NO DIMINUTION OF THE BANKRUPTS' ESTATE RESULTED.

The testimony of the parties discloses that an oral contract was entered into on March 1, 1939, wherein it was agreed between appellant and the bankrupts that the bankrupts could use the moneys collected by them in respect to the appellant's pawn tickets solely for re-loans to the customers of the bankrupts, and that the pawn tickets thereafter coming into their possession and representing the proceeds of the appellant's security so re-loaned should stand in the place and stead of said proceeds. (Appendix, 103-115.) This arrangement is approved by the decisions, the leading case being *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235.

The Court there states the principle, as follows, at page 120 of the opinion:

“It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the

meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. . . . The reason is, that the exchange takes nothing away from the other creditors.”

The case of *Sawyer v. Turpin* has received express approval in the Ninth Circuit. *Roberts v. Yegen*, 12 Fed. (2d) 654 (9 Circ.). Other cases directly illustrating the general rule are as follows:

Sexton v. Kessler, 225 U. S. 90, 32 S. Ct. 657, 56 L. Ed. 995;

In re Reese-Hammond Fire Brick Co., 181 Fed. 641 (3 Circ.);

Union Trust Co. v. Bulkeley, 150 Fed. 510 (6 Circ.);

Union Trust Co. of Maryland v. Townshend, 101 Fed. (2) 903 (4 Circ.), (Cert. den. 307 U. S. 646);

Chapman v. Hunt, 254 Fed. 768 (2 Circ.);

Burrowes v. Nimocks, 35 Fed. (2d) 152 (4 Circ.);

Greey v. Dockendorff, 231 U. S. 513; 34 S. Ct. 166; 58 L. Ed. 339;

Okin v. Isaac Goldman Co., 79 Fed. (2d) 317 (2 Circ.).

In *Greey v. Dockendorff*, 231 U. S. 513, 33 S. Ct. 166, 58 L. Ed. 339, it appeared that the bankrupt, a

cotton converter, borrowed, over a period of time, approximately \$253,000.00 from a creditor, giving as security therefor its future accounts receivable. By the agreement, the creditor's lien was to be for all sums due and to cover all accounts.

In rejecting the contention of the trustee in bankruptcy that the assignment was invalid, the court stated at page 515 of the opinion:

“The question here is whether successive assignments of accounts by way of security, in pursuance of a contract under which advances were made to enable the assignor to get the goods on the faith of the undertaking that the accounts should be assigned, were bad because the contract embraced all accounts, although neither party contemplated any fraud. The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business, but we have no such statute. *The advances were the means by which the bankrupt got the ownership of the goods. The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired.* Field v. New York 6, New York 179. We do not see why in the interval between the acquisition of the goods and the specific assignment of accounts, the right of general creditors without lien should intervene to defeat a security given in good faith, when, but for the promise of it, the property never would have come into the bankrupts hands. There may have been a moment when the goods could have been attached, or when, if insolvency had been made known, as in *National City Bank vs. Hotch-*

kiss, ante P. 50, it would have been too late to make the promised lien good. But in this case, the lien was acquired before any knowledge of insolvency, and before any attachment intervened. See *Jaquith v. Alden*, 189 U. S. 78; *Coder v. Arts*, 213 U. S. 223; *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 583. It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors. *Williams v. Ingersoll*, 89 N. Y. 508, 522, and merely keeping silence to the latter, whether known or unknown, created no estoppel. *Weiser v. Lawler*, 189 U. S. 260, 270; *Ackerman v. True*, 175 N. Y. 353, 363. There was no active concealment and no attempt to mislead anyone interested to know the truth."

The record in this case indicates that between February 24, 1938, and the date of the bankruptcy, the bankrupts collected \$44,915 upon the pawn tickets assigned to the appellants. (Appendix, page 118.) During that period the appellant had loaned to the bankrupts an additional sum of \$8,350.00. (Appendix, page 117.) It further appears that during this period the bankrupts loaned out a total of \$55,120.37. (Appendix, page 180.) Therefore, the appellant furnished over 96% of the moneys available for loaning by the bankrupts to its customers. Under these facts, the appellant should have a favored standing as a secured creditor in a court of bankruptcy.

Greey v. Dockendorff, supra, pp. 25-27.

In the case of *Okin v. Isaac Goldman Co.*, 79 Fed. (2d) 317 (2 Circ.), the bankrupt, a publisher, assigned to the defendant as security for present and future indebtedness an account due from American News Company. A second assignment was made by the bankrupt of an account due from Public News Company. These assignments were executed more than four months before the date of bankruptcy. Within the four months' period, the defendant received payments from the American News Company for credits it had advanced to the bankrupts for printing. With reference to the payments from the Public News Company, these represented current credits the defendant had advanced in connection with the issues of the bankrupts' magazines within the four months' period. The trustee in bankruptcy sought to recover all of these payments as voidable. At page 320 of the opinion, the Court states:

“The Circuit Court of Appeals for the Sixth Circuit, in *Union Trust Company v. Bulkeley*, 150 F. 510, at p. 516, held that:

‘A parol assignment of an account and bills receivable to be acquired in the course of business by the assignor, given in order to furnish security, though relating to after-acquired property, created a valid lien upon the property, the Court saying: “When acquired, it would become subject to the lien without any new or further agreement. This is something quite different from an execu-

tory contract.” . . . Union Trust Company v. Bulkeley, supra . . . while dealing specifically with the common law of Michigan, in our opinion sets forth the common law of New York as well as England, in relation to the time when liens created by an assignment of after-acquired accounts will take effect. It seems particularly pertinent because of its statement that they will take effect when the accounts are acquired by the bankrupt “without any new or further agreement.”

‘In view of the foregoing, the payments to the defendant by the American News Company, in our opinion, created no preference irrespective of whether or not they were upon an antecedent indebtedness to the latter or in liquidation of advances made after April 8, 1931, when the assignment was executed. This is because all of the accounts covered by the assignment arose outside of the four months’ period. *Sexton v. Kessler & Co.*, 225 U. S. 90; *Voltz v. Treadway*, 59 F. (2) 643; *Goldstein v. Rusch*, 56 F. (2) 10; *Union Trust Co. v. Bulkeley*, 150 F. 510.

‘The assignment of the account against the Public News Company and the payments to the defendant thereunder created no unlawful preference, but for a different reason . . . while the accounts against the Public News Company for the September issue may in whole or in part have arisen prior to the four months’ period, the account for the October

issue certainly arose within that period. These considerations, however, cannot affect the result or render the payments preferential. . . . *So far as they were made from accounts which arose within the period, they were in liquidation of security given by the bankrupt to obtain future advances of credit from the defendant.* As we have already stated, the lien took effect when the accounts against Public News Company came into being. The advances, when made, furnished a present consideration for the imposition of the liens. The decision of *In re Bernard & Katz, Inc.*, (C. C. A.) 38 F. (2), 40, 43, had to do with such a situation. There, Swan, J., remarked: *'When the parties agree in good faith that a lien presently created shall stand as security for future advances, and such advances are thereafter actually made in good faith before the bankruptcy of the borrower, we see no reason to deny effect to the agreement. . . . The future advance, when made, becomes a present consideration; it increases the borrower's assets by as much as the enlargement of the lien decreases them.'*

In re Locust Bldg. Co. (C. C. A.), 299 F. 756, 769, is to the same effect. Although the accounts against the Public News Company were not in existence when the assignment was made as was the security *In re Bernard & Katz*, *supra*, there was no depletion of the estate caused by the payment, inasmuch as it was given in exchange for the magazines printed at the cost of the defendant, and furnished to Quality Publication, Inc., at the

same time when the assignment actually took effect. Indeed, the account of Public News Company was but a substitute for the magazine. Accordingly, the fact that the payment was made during the four months' period can make no difference, because it was derived from the accounts which were a present consideration for the delivery of the magazine." (*Italics ours.*)

IV.

THE ASSIGNMENTS TO THE APPELLANT CANNOT BE DEEMED PREFERENTIAL FOR THE REASON THAT THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF THE REFEREE AND THE DISTRICT COURT: THAT ON FEBRUARY 24th, 1939 (DATE OF FIRST CONTRACT OF ASSIGNMENT), AND FOR SOMETIME PRIOR THERETO AND CONTINUOUSLY THEREAFTER, SAM KLEINMAN (APPELLANT) HAD REASONABLE CAUSE TO BELIEVE AND DID KNOW THAT THE BANKRUPTS AS CO-PARTNERS AND AS INDIVIDUALS WERE INSOLVENT.

In approaching this phase of the argument, we desire to state at the outset that we are not unmindful of the rule prevailing in this jurisdiction to the effect that this court will not reverse the findings of the Referee and the District Court, except for manifest error.

Ott v. Thurston, 76 Fed. (2d) 368 (9 Circ.);

Weisstein Brothers v. Laugharn, 84 Fed. (2d) 419 (9 Circ.).

It is, however, the rule in this circuit that where obvious error has occurred in the application of the law to the facts, or in the consideration of the facts, or if there is no substantial evidence to support the decision, the propriety of the findings is open to question.

Hunter v. McFarlane, 45 Fed. (2d) 994 (9 Circ.);

Harris v. Prudential Insurance Co. of America, 78 Fed. (2d) 849 (9 Circ.).

This Court has not hesitated to reverse the finding of the Referee, affirmed by the District Court, that a creditor knew or had reasonable cause to know of the insolvency of the debtor, where such finding was not justified by the evidence.

Valley National Bank v. Westover, 112 Fed. (2d) 61 (9 Circ.) (Cert. den. 311 U. S. 675.).

In the Appendix, pages 1 to 83, the material testimony pertaining to the question of knowledge of insolvency is set forth. We believe that a reading of this testimony discloses that the following are the essential facts concerning Appellant's knowledge of the financial condition of the bankrupts.

The bankrupts owned two pawn-broking establishments in Los Angeles, California, and approximately ten amusement and other enterprises in the states of California, Nevada and Montana, and considerable real estate in Glendale, Redondo Beach and San Mateo

County, California. The Glendale property alone represented an investment of \$120,000.00 on the part of the bankrupts. (Appendix, pages 63, 68 to 76.)

In the pawn-broking business the bankrupts owned large quantities of merchandise, consisting of gems, gold, platinum and other jewelry, and unredeemed pledges, valued at hundreds of thousands of dollars. Part of these assets were displayed in show cases and the remainder were stored in vaults located in the two loan establishments. (Appendix, pages 56 to 65.)

The bankrupts were in the business of loaning money as pawnbrokers, and loans earned interest at the rate of from two to three per cent per month, depending on the size of the loan. (Appendix, 57, 58, 63.) The security for their loans was ample to protect them against loss of principal and interest; in the event of default on the part of their customers, they were able to and did sell the forfeited pawns at a profit. (Appendix, 65 to 67.) Ordinarily when business was good, the bankrupts' money was "working," that is, all "loaned out." Generally they were short of cash, and that indicated that business was good, and until the date of bankruptcy, no contrary indication appeared. (Appendix, pages 22 to 24.) From at least 1932 on the bankrupts were always borrowing money. (Appendix, pages 32, 47.)

The bankrupts did not conduct their affairs in a businesslike manner. They did not at any time know the extent of the value of their merchandise or other

assets. They had no inventory of these assets. They did not know either the amount of their liabilities or the amount of their assets at any time prior to the filing of their schedules in bankruptcy. They did not know the financial condition of their business at any time prior to the date of bankruptcy. (Appendix, pages 76 to 82.)

The appellant had known the bankrupts for approximately twenty-five years prior to bankruptcy. (Appendix, page 3.) Fourteen years before the date of bankruptcy, appellant commenced loaning them substantial sums of money. (Appendix, pages 2 and 3.) Four years before the date of bankruptcy, appellant was employed by the bankrupts as a gem appraiser at Provident Loan Association, one of their pawn-broking establishments in Los Angeles, earning \$75.00 per week and 1% commission on his sales. (Appendix, pages 4, 5.)

At frequent intervals during all of appellant's contact with the bankrupts from 1936, and somewhat more often during the last six months before the filing of the petition in bankruptcy, the cash drawer of the bankrupts from which money was taken for loans to customers, contained insufficient cash for that purpose. (Appendix, pages 33 to 38, 46.) On many occasions from 1936 on, the appellant advanced sums of money from \$100 to \$15,000 in amount, taking the bankrupts' I.O.U.'s in order that they might replenish their cash drawer for making loans. (Appendix, pages 54 to 55.) Appellant knew that on many occa-

sions one of the clerks at the Provident Loan Association would telephone to the other pawnbroking establishment of the bankrupts for money to restock the cash drawer. (Appendix, pages 33 to 34.)

As early as 1936, the volume of merchandise on hand for sale at the Provident Loan Association diminished and the appellant's duties as a gem appraiser changed at that period. Thereafter he acted partly as a loan clerk. (Appendix, page 5.) In that work he became familiar with the contents of the cash drawer, and of the loaning and reloaning of the bankrupts' cash. (Appendix, pages 5, 19 to 21.)

The history of appellant's loans to bankrupts is as follows: From 1925 to 1933, loans in \$10,000, \$15,000 and \$20,000 amounts were made and repaid. (Appendix, page 3.) In 1933 or 1934, appellant loaned the bankrupts \$30,500.00. In 1935, appellant loaned them an additional \$19,500.00. In 1936, appellant loaned the bankrupts sums totaling an additional \$20,000.00. In 1938, appellant loaned them sums totaling \$25,700.00. Generally, these loans were made by the appellant to the bankrupts informally, and upon a mere request, some of which were evidenced only by I.O.U.'s, and handled in a very casual manner. (Appendix, pages 47, 52 to 55.) By December, 1938, the bankrupts owed appellant \$95,700.00. On February 24, 1939, additional credits and cash due to appellant by the bankrupts brought the total to \$100,000.00. From February 24, 1939 (the date of the security

transaction), to the date of bankruptcy, appellant loaned the bankrupts \$8,350.00. (Appendix, page 117.)

The incident leading up to the obtaining of security by the appellant was his desire to leave the employ of the bankrupts because of poor health. (Appendix, pages 7 to 10, 13, 17, 19.) The bankrupts assented to his request for security. (Appendix, pages 10, 11, 13, 30.) The only problem that was left to work out was the type of security that he should be given. (Appendix, pages 83 to 86.) After preliminary discussions as to the type of security, it was agreed that there should be assigned to the appellant pawn tickets of the bankrupts of a value in excess of the amount of his claim. (Appendix, pages 83 to 86.)

At the time of the execution of the security contract of February 24, 1939, the appellant did not know of the existence of any other large obligations of the bankrupts. (Appendix, pages 30, 44, 45.) On February 28, 1939, the appellant learned for the first time that the bankrupts had been sued and their property attached by a creditor. (Appendix, pages 21, 22, 24, 25, 31, 39 and 40.) Prior to that date the bankrupts had never discussed their business affairs with appellant, except to tell him that if they had more cash they could do more business. (Appendix, pages 28, 29.)

Appellant assisted the bankrupts in the removal of the attachment by allowing an exchange of part of his assembled and tabulated pawn tickets for other pawn tickets in order to speed the removal of the sheriff

from the premises. (Appendix, pages 26 to 27.) Subsequently, appellant allowed a similar exchange with regard to another creditor. (Appendix, page 43.)

During this period following the attachment, in March, 1939, on one occasion the bankrupts asked the appellant to hold a check that they had given him for a day or two. (Appendix, pages 31 to 32.)

The appellant knew that the cash of the bankrupts in the ordinary course of their business as money lenders would be converted into merchandise, gems and unredeemed pawns. He knew that the bankrupts could always use more money in their business. (Appendix, pages 47 and 28, 29.) He knew that the bankrupts had large numbers of valuable articles of merchandise and unredeemed pawns at the Provident Loan Association and at the State Loan office, the other pawnbroking establishment of the bankrupts. (Appendix, pages 42, 58 to 60.) He was told by the bankrupts that their amusement enterprises were profitable. (Appendix, pages 71 to 76.)

As late as February 28, 1939, the bankrupts stated in the presence of the appellant that they were solvent, and that their assets far exceeded their liabilities; that they were only hard pressed for ready cash. (Appendix, pages 41, 49 to 51.) At no time within the year prior to bankruptcy did the bankrupts sustain any material loss; nor was there any change in the quantum of their assets. (Appendix, page 78a.)

Such books as the bankrupts had were not accessible to appellant. (Appendix, pages 51, 52.)

The appellant voluntarily left the bankrupts' employ on December 24, 1938. (Appendix, pages 5 to 7.) Immediately after the attachment of February 28, 1939, appellant re-entered the employ of the bankrupts (Appendix, pages 5 to 7) and at that time stated that he felt everyone should work to reduce the expense, and he voluntarily lowered his previous salary of \$75.00 per week to \$50.00 per week. Due to his impaired health, he was to be allowed to work less arduous hours. (Appendix, pages 16 to 19.)

We urge that under the law these facts fall far short of presenting a case of knowledge of insolvency within the meaning of the Bankruptcy Act. If anything, the record discloses that the Appellant had reasonable cause to believe that the bankrupts were solvent. The applicable rule is summarized in 4 Remington on Bankruptcy, Sec. 1827:

“Reasonable cause is belief that a preference would be effected but the transaction necessarily involves reasonable cause to believe that the debtor was in fact insolvent, and this means reasonable cause for belief that his assets at fair valuation do not equal his liabilities.”

In the case of *In re Solof*, 2 Fed. (2d) 130 (9 Circ.), in determining whether a creditor had reasonable cause to believe that a preference was intended the court stated at page 131:

“ ‘It is not enough that a creditor has some cause to suspect the insolvency of his debtors; but he

must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for a debt. To make mere suspicion a ground of nullity in such a case, would render the business transactions of the community altogether too insecure. . . . A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law.' . . .

Counsel for appellant directs our attention to a large number of, what he terms, 'badges of reasonable cause to believe,' such as information contained in a financial statement; advice to the debtor to make no large payments to creditors; to make payments on a pro rata basis only; refusal to ship further goods; accepting return of merchandise; information that creditors were pressing; protested checks and trade acceptances; requirement that payments be made in cash or cashier's check; extensions requested; failure to inspect books when the opportunity presented itself; and an intimate knowledge of the business affairs of the debtors. All these circumstances may, and doubtless do, indicate that the creditor was apprehensive as to its claim; but they do not necessarily prove that it had a reasonable cause to believe that a preference was intended. Other testimony in the case throws some light on the general situation.

The bankrupts had conducted a large and extensive business for some years prior to bankruptcy. So far as the record discloses, no question as to their financial standing arose until late in the year 1922 or early in 1923. They continued to conduct their business in the usual and ordinary course up to the filing of the involuntary petition against them. During the four months' period, they paid to creditors on open account, notes payable, and trade acceptances, the sum of approximately \$168,000, and purchased merchandise on credit, to the amount or value of approximately \$111,000.00. Were creditors to whom these vast sums were paid all preferred, and were wholesalers selling merchandise on credit to a concern of known insolvency or even of questionable solvency? These questions suggest their own answer. It may be urged that the appellee had knowledge of facts not possessed by other creditors, but we are not convinced that such was the case."

In *Valley National Bank v. Westover*, 112 Fed. (2d) 61 (9 Circ.), it appeared that a suit was brought by the trustee in bankruptcy to recover payments made by the bankrupt to the appellant bank on the ground that they were preferential payments. The appellant bank challenges the finding of fact of the trial court that it had reasonable cause to believe that the payments made to it would effect a preference.

Two circumstances were strongly relied upon by the trustee to sustain the finding of the trial court that appellant knew that bankrupt was insolvent when it accepted payment.

The Court, in considering the matter, stated at page 61:

“These two circumstances must be considered in connection with all the other evidence relating to the financial situation of the bankrupt and the dealings of the appellant.

. . . the business of the bankrupt was a relatively small one, recently established, and that its solvency from time to time would depend upon its ability to collect obligations due to it from its customers; . . . as late as June 30, 1937, the bankrupt paid a substantial dividend and paid income taxes upon a profit of about \$9000.00. The audit upon which these dividends were paid was brought to the knowledge of, and was considered by the bank at the time two loans, aggregating \$2000, were made by it to the bankrupt. . . . It is not claimed that there was any important loss or change in the method of doing business during the period under consideration which would give notice to a casual observer that the company was in any financial difficulty. . . . The first circumstance referred to is the knowledge of the bank of the demand for the payment of \$3000 upon an overdue account early in August by the Arizona Sash and Door Company. Its attorney spoke to Carl Gibson, Vice President of the bank, concerning the matter. . . . The loan of August 12, 1937, of \$2000 was made by the appellant to the bankrupt while this matter was pending. . . . Half the amount due the creditor was paid August 26, 1937. The balance was allowed to stand. The creditor continued to furnish material to the bankrupt on

credit until the time its property was placed in the hands of a receiver. There is no indication in this circumstance which would reasonably require an inference of insolvency.

The other circumstance relied upon by the appellee was the application for, and refusal of, a loan of \$20,000 to the bankrupt on September 20, 1937, by the appellant. As this loan was larger in amount than the stock carried by the bankrupt, the explanation given by the bank . . . is obviously well-founded and involved no conclusion of insolvency.

As to whether or not the payments made by the bankrupt were intended to be preferential and must reasonably have been believed such, it should be said in addition that so far as appears the bank made no effort at any time to collect the amounts it had loaned to the bankrupt. . . . Several of the officers of the bank . . . testified that they had no knowledge of the insolvency of the bankrupt at the time the payments were made by it to the bank . . . there was no intent to make or receive a preferential payment and that the payment was made in the ordinary course of business.

We conclude that there is no evidence to justify the finding of the trial court that the appellant knew or should have known that the payment was preferential. . . . We are satisfied that the judgment must be reversed . . . upon the ground that the trustee has failed to establish knowledge, actual or constructive, of the bank that the payments made to it were intended as a preference.” (Italics ours.)

In the case of *In re Klein Moffett Co.*, 28 Fed. (2) 523, D. C. Maryland, in determining whether a creditor had reasonable cause to believe that the bankrupt was insolvent, the Court stated at page 525 of the opinion:

“But it appears that in the present case the bank had reasonable cause to suppose that the company was not insolvent. It is true that the revised statement showed a very large shrinkage in net worth, but from the statements made to the bank by those presumed best qualified to know, namely, the company’s president and counsel, the bank was justified in believing that the company might be rehabilitated. At least, the bank had a right to take for their face value the statements made to it that, if its temporary embarrassment might be relieved by affording it some ready cash, unfilled orders might be carried out and the business generally revived. Add to this the fact that the company had been a reputable business concern, of considerable size, for many years, a satisfactory, regular client of the bank, and the further fact that the bank elected to forego the exercise of an alternative legal right, which, in contemplation of insolvency, would obviously have been more beneficial to the bank, it is difficult to conclude that the bank, through its officials, is to be charged with having more than ground to *suspect* insolvency.

As we have seen, there is a clear distinction in the law between reasonable belief of a debtor’s insolvency and cause to suspect such insolvency. The former creates such a preference; the latter does not. *Grant v. First National Bank*, *supra*. It is to

be borne in mind that Section 60a of the Bankruptcy Act does not use the term 'insolvent' in its common law sense, as indicating the inability of a person presently to pay his debts as they mature, but with the meaning as specifically defined in Section 1a (15), namely: 'A person shall be deemed insolvent within the provisions of this title, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.' "

11 U. S. C. A., Sec. 1 (15).

In *Okin v. Isaac Goldman Co.*, 79 Fed. (2d) 317 (2 Circ.) at p. 321, the Court states:

"The bankrupt continued in business for nine months after the assignment of the account against the American News Company was made and six months after the assignment of the account against the Public News Company. The defendant had some concern about the bankrupt's indebtedness and its default in the payment of two notes. It required the assignments in order to obtain security if it was to continue to print the magazine. There is no proof that it had any further knowledge of the bankrupt's financial condition, and it continued to advance credit during the period prior to the filing of the petition so that the bankrupt then owed it some \$3,000 more than in April, 1931, when the first assignment was made. We think such facts did not give the defendant reasonable

cause to believe that the giving of security would effect a preference even if the bankrupt be thought to have had such an intent.”

It is stated in *Brookheim v. Greenbaum*, 225 Fed. 635-638; *Aff'd* 225 Fed. 763 (2 Circ.):

. . . “It does not seem to me that, in the case of a man who concededly did business in such an unbusinesslike way as this bankrupt, shortness of cash and absence of free capital, continuing for so long a period of time without any insolvency, ought to be enough to put on inquiry all those who dealt with him. It must be remembered that something more than suspicion is necessary.”

In the case of *In re Salmon*, 249 Fed. 300 (2 Circ.), it was stated, at page 303:

“ . . . insolvency under the Act means something more than that the debtor was financially embarrassed and hard pressed by his creditors. This condition may exist, and the debtor still be solvent, . . . it would not taken alone be reasonable cause to believe him insolvent, especially in view of the fact that he had made the same remark a year before, and had thereafter told him that he had ‘financed’ and was ‘all right again.’ ”

In *Hurley v. N. J. Reilly*, 13 Fed. (2nd) 466 (D. C. Mass.), the Court stated, at page 468:

“It cannot be said as a matter of law that a creditor, who receives in payment or as security assignments of account, must, as a reasonably

prudent business man, be led to the conclusion that the debtor making the assignments is insolvent, especially if other facts and information known to the creditor justify an honest belief in the solvency of the debtor.”

To the same effect, we respectfully direct the Court's attention to the following cases:

Sumner v. Parr, 270 Fed. 675; Aff'd 270 Fed. 677 (2 Circ.);

Marks v. Wenzel, 6 Fed. Supp. 981, Aff'd 70 Fed. (2d) 1019 (2 Circ.);

Everett v. Warfield Mining Co., 37 F. (2nd) 328 (4 Circ.);

Ensley v. First National Bank, 17 Fed. (2) 603; (D. C. Ill.);

Hershon v. Abelson, 69 Fed. (2nd) 102 (2 Circ.) (Cert. den. 292 U. S. 642).

From the evidence, we have seen the following facts among others, are established:

- (1) The appellant had no intimate knowledge of the financial condition of the bankrupts.
- (2) The appellant did not know of the existence of other large creditors nor that the bankrupts were unable to pay their debts until after his security contract.
- (3) The appellant had no knowledge of the books of the bankrupts nor opportunity to examine the same.

- (4) The bankrupts were conducting their business in the usual and ordinary course at the time of the execution of the security contract of February 24, 1939, and thereafter.
- (5) The bankrupts during the entire period in question and up to bankruptcy did not sustain any important loss or change in assets or liabilities.
- (6) The appellant advanced credit to the bankrupts up to the date of bankruptcy.
- (7) Shortness of cash did not indicate failing circumstances; it was a token of good business, and in any event had existed from 1936 without insolvency. For over 10 years the bankrupts had regularly borrowed cash from the appellant.
- (8) The bankrupts believed, and informed the appellant, that they were solvent, with large amounts of receivables, and other valuable assets, and short only of cash.

It is submitted that there is an utter want of facts upon which to base the finding of knowledge of insolvency, and that applying the law as set forth in the foregoing decisions, to the facts herein, the conclusion must be reached that the appellant did not have reasonable, or any cause, to know or believe that the bankrupts were insolvent at the time of the transfers.

CONCLUSION

We respectfully urge that upon the grounds herein set forth, to wit, that the agreements between the appellant and bankrupts were valid, and that no preference was effectuated within the bankruptcy law, and that the Trustee failed upon the issue of knowledge of insolvency, the decision of the lower court be reversed.

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7

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

SAM KLEINMAN,

Appellant,

v.

PAUL W. SAMPSELL, Trustee in
Bankruptcy of the Estate of Abraham
Zemansky, David Zemansky and Sol
Zemansky, doing business under the fic-
titious names and styles of Provident
Loan Association and State Loan Of-
fice, Bankrupts,

Appellee.

FILED

JAN - 5 1943

PAUL P. O'BRIEN,
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APPENDIX TO OPENING BRIEF OF APPELLANT

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No. 10236

APPENDIX TO OPENING BRIEF OF APPELLANT

The Testimony appearing in the record with regard
to

“THE QUESTIONS INVOLVED,” Item IV.

(DID THE APPELLANT AS CREDITOR OF
THE BANKRUPTS HAVE REASONABLE
CAUSE TO BELIEVE THAT THE BANKRUPTS
WERE INSOLVENT?)

SOL ZEMANSKY

DIRECT EXAMINATION

MR. CHOTINER: Mr. Zemansky, directing your attention to 1933,* did Zemansky Brothers borrow any money from Sam Kleinman?

A. I believe in that period of time we had borrowed some money from him. I am not certain as to the date.

Q. BY MR. CHOTINER: Do you know what rate of interest was paid to Mr. Kleinman on the money that he loaned to Zemansky Brothers?

A. I believe it was 12 per cent. (Tr. 99.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. Would it be fair to say, Mr. Zemansky, that between 1927 and 1929 you had considerable monetary transactions with Mr. Kleinman, all of which were repaid to him prior to 1929?

A. Yes.

Q. Then in 1933 you had another monetary transaction with Mr. Kleinman?

A. Yes.

Q. And you had several monetary transactions until 1935, is that correct?

A. That is correct. (Tr. 234.)

*Italics used herein are ours.

SAM KLEINMAN

DIRECT EXAMINATION

Q. Mr. Kleinman, approximately when did you first meet the Zemansky Brothers? (Tr. 440.)

A. I met the Zemansky Brothers around in 1912 or 1913.

Q. When did you, first of all, ever loan them any money?

A. I loaned them money, the exact time I can't tell. It is a long time back. It must have been around 1925.

Q. Do you remember how many years after 1925 you loaned them money?

A. Oh, I believe I was doing business with them, loaning them money up until around 1928.

Q. Do you know approximately, Mr. Kleinman, how much money you would loan them from time to time during that period?

A. I used to give them at a time \$10,000, \$15,000 and \$20,000. (Tr. 441.)

Q. Were all of these sums repaid to you?

A. Yes, everything was paid up.

Q. After 1928 they owed you no money, during the year 1929 or 1930?

A. After 1928, I believe, yes.

Q. Did you again loan them any money after 1928?

A. 1928 I did, yes sir.

Q. When did you first loan them money after 1928?

A. In, I believe, 1933.

Q. Did you loan them money after 1933?

A. Yes.

Q. When did you start to work for them, Mr. Kleinman?

A. I started to work for them around the last part of 1935. (Tr. 441.)

Q. During that time, did you loan them money from time to time?

A. You mean after 1938?

Q. Yes.

A. Yes sir.

Q. Excuse me; I meant after 1935, Mr. Kleinman?

A. Oh, yes, yes, yes sir. (Tr. 442.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. When was it that he first became employed by the Provident Loan Association, approximately?

A. I think it was around 1935.

Q. What were his duties when he first became an employee?

A. He was to dispose of the merchandise.

Q. You say he was to dispose of the merchandise. Will you tell the Court just what that entailed?

A. That entailed the disposition of the expired pledges, which were turned over to him, and he was employed to sell them.

Q. What was done with the proceeds, that money?

A. It was turned over to the Provident.

Q. To the Provident. What salary did you pay Mr. Kleinman when he was employed by you?

A. \$75 a week, and then he received one per cent on each sale. (Tr. 100.)

Q. During the time that he was employed, did he have any other duties besides selling jewelry that was received as the result of any unredeemed purchase?

A. Originally he did not, but later on he used to assist in the loan department.

Q. *When was it that he started to assist in the loan department?*

A. *Well, I should judge sometime around about 1937, 1936 or '37.* (Tr. 100.)

Q. BY THE REFEREE: Mr. Zemansky, did Mr. Kleinman ever actually leave your employ, in other words, was he ever off the pay roll?

A. I don't think he was.

Q. You don't think he was?

A. No.

Q. Was he away from the place of business for any extended period of time?

A. Yes, he used to go up to San Francisco quite often, staying two or three days, sometimes a week.

Q. Was he away more than a week at a time?

A. I think so. (Tr. 271.)

Q. That was always with your permission?

A. Yes sir.

Q. So far as you know, he remained on the pay roll at that time?

A. Yes. My brother Dave wrote the checks, so he would know definitely.

Q. You really don't know whether he was on the pay roll?

A. I am inclined to think he was always on the pay roll. (Tr. 272.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Did you ever go back to work for the Zeman-skys after you left their employ?

A. After I left their employ, yes, sure.

Q. When did you go back to work there?

A. I went back to work for them—it would be awfully hard for me to tell if it was two months or maybe a few days later, but I promised Sol I will go back and help him out but not to ask me any more to come back when I got through again. He said “No more than a few months.” (Tr. 420.)

Q. What did you do after you quit their employ the last week in December of 1938?

A. In 1938, I went up—I was taking a rest and went up to San Francisco.

Q. For what purpose did you go to San Francisco?

A. I went up to San Francisco to see my daughter and grandchild. (Tr. 442.)

STIPULATION RE EMPLOYMENT

MR. WOLVER: Mr. Laugharn, I understand the books of Zemansky Brothers indicate, and I ask for a stipulation, that Mr. Kleinman received no salary between the last week in December and the first week in March, 1939. I believe Mr. Young and Mr. Yates can verify that for you gentlemen. (Tr. 461.)

MR. LAUGHARN: Here is the effect of what they are stipulating. They have inspected the books and the last check in 1938 was December 24, 1938, \$74.25, and the first check in 1939 was March 11, 1939, \$49. That's what the record shows.

MR. WOLVER: May we have that so stipulated?

MR. LAUGHARN: So stipulated on our part. (Tr. 462.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. BY MR. CHOTINER: Directing your attention to the latter part of 1938 or the 1st of January, 1939, was there any discussion between you and Mr. Kleinman regarding Mr. Kleinman terminating his association with the Provident Loan Association?

A. I believe at one time during that period that he said he wanted to leave. I asked him why and he said—

Q. Was there a conversation in regard to that subject?

A. He said he wanted to go away and rest up, take sort of a vacation for a while.

Q. Did he ask for his money at that time?

A. I believe he said he wanted, if I remember the conversation, he wanted to leave and he desired to have his money secured while he was away. (Tr. 102.)

Q. This is at the time when you said, around the first of 1939, or the end of 1938, that there was a discussion regarding Mr. Kleinman leaving the Provident Loan Association.

A. I believe at that time is when he asked if I would secure him for the loan.

Q. When was it that he asked you, if he ever did, for payment of any part of the money that was owing to him?

A. About that same period.

Q. That was the time that this conversation took place which you just related here, is that correct? (Tr. 103.)

A. Yes.

Q. What did Mr. Kleinman say to you, if anything, after you told him you could not pay him any money?

A. I believe that was the time he mentioned giving him the loans. (Tr. 104.)

Q. BY MR. CHOTINER: Mr. Zemansky, did you (Tr. 105) ever have any conversation with Mr. Kleinman relative to this borrowing of money elsewhere to be used in the business?

A. Yes.

Q. Was that before or after the security was given?

A. Before and after, both.

Q. Directing your attention to the time before the security was given, what conversation did you have with Mr. Kleinman regarding that subject?

A. Mr. Kleinman told me he thought he would be able to procure some money for us at the Union Bank, I believe. (Tr. 106.)

Q. Then Mr. Kleinman volunteered the statement or first saying to you "I believe I can get some money at the Union Bank"?

A. That is right.

Q. What did you say?

A. I told him I thought we would be able to use it. (Tr. 106.)

A. He said if his loan was secured, he thought it would enable him to procure more credit at the Union Bank. (Tr. 106.)

Q. Was that conversation held before the security was given?

A. I believe it was before. (Tr. 107.)

Q. When was the first time that the subject of giving security to Mr. Kleinman was discussed?

A. I believe it was the latter part of 1938 or the early part of 1939.

Q. Did Mr. Kleinman tell you why he wanted security? (Tr. 195.)

A. He said he was obliged to go away on a vacation, if I recall, and would like to be secured. That is the substance of the conversation.

Q. Did he give any other reason as to why he wanted security?

A. Yes, I believe there was another reason.

Q. What reason did he give?

A. I think he said at that time he thought he would be in a position to secure some more money at the Union Bank at that time.

Q. Did Mr. Kleinman say anything about the fact that he would feel better about it if he had security?

A. Yes, he said he would feel better while he was away on his trip.

Q. What did he say in regard to that subject matter, if there was anything else said?

A. That was just about all that was said.

Q. Did Mr. Kleinman say anything as to why he would feel better about it if he had security?

A. He didn't say.

Q. Did you say anything to him about whether it was necessary for him to have security?

A. No, I don't believe I did. (Tr. 196.)

Q. Now, was there anything said by any of the parties to the conversation at which Mr. Dienstag was present, as to what Mr. Kleinman's course of conduct would be if you did not give the security?

A. There was never anything mentioned.

Q. Was that subject ever discussed at any time?

A. No. (Tr. 214.)

Q. Did you ever tell Mr. Dienstag prior to the signing of the February 24th contract, that you would be unable to give Mr. Kleinman any security?

A. I don't recall that. (Tr. 216.)

Q. I know that, but I mean your first conversation with Mr. Dienstag, did you consent during that conversation to give security to Mr. Kleinman?

A. I had already told Mr. Kleinman it would be all right. (Tr. 216.)

SOL ZEMANSKY

RE-DIRECT EXAMINATION

BY MR. CHOTINER:

Q. I believe you testified on cross-examination that you noticed a difference in Mr. Kleinman's health during the time that he was associated at the Provident Loan Association. Now, Mr. Zemansky, did you notice what his condition was beginning with the 1st of January, 1939, up to February 24, 1939, as to his state of nervousness?

A. Well, I wouldn't be qualified to answer that.

Q. Well, can you tell us what Mr. Kleinman's demeanor was as to the manner in which he walked at the Provident Loan Association during that period of time? (Tr. 261.)

A. I never noticed any difference. (Tr. 261.)

SOL ZEMANSKY

RE-CROSS EXAMINATION

Q. BY THE REFEREE: Mr. Zemansky, this instrument bears date February 24, 1939. You pre-

viously testified you signed it in the City of San Francisco?

A. Yes. (Tr. 273.)

Q. How long after you returned to Los Angeles did the Sheriff walk in?

A. A few days after. (Tr. 274.)

LEO KRAVITZ

DIRECT EXAMINATION

Q. Did Mr. Kleinman ever say anything to you about his difficulty in having his account taken care of in any way? (Tr. 281.)

THE WITNESS: What account? (Tr. 281.)

Q. BY MR. CHOTINER: The money that was owing to him by the Zemanskys.

A. I never knew he had any difficulty. He had never spoken to me anything about his account. (Tr. 282.)

SAM KLEINMAN

DIRECT EXAMINATION

(Tr. 393.)

Q. *When was the first time that you really discussed the question of getting security; was that in January?*

A. In January. (Tr. 394.)

Q. With whom did you have the conversation?

A. Sol Zemansky. (Tr. 394.)

Q. What did you tell Mr. Zemansky about your getting security?

A. Well, I came in there and I had my personal papers in the office in my desk. I was around there. Sol came in. He said "Sam, how are you feeling, how are you feeling?" I said "I am feeling a little better and I am getting rested up." He said "Well, everything is O.K. You are feeling better." I said "Yes." A couple of days later, or maybe it was, I don't remember whether it was two days or three days later he came in my office and talked about different things, and I said to him "Sol, I am no more employed by you and how would you like to give me—you know, I left you; how would you like to give me security for my money?" Sol says, "Why, Sam, anything I can do for you, I will be glad to do it for you, give you security if you want it; of course, I don't like to have you leave me, but if you want security I will be glad to give it to you."

Q. Now, when you had that conversation with Mr. Zemansky, had you already left the employ of the Provident Loan Association?

A. Yes sir. (Tr. 395.)

Q. What was said about security?

A. Mr. Dienstag when he came down, he said "Sol, I suppose you understand that I understand Sam talked to you that he wanted—he is no more employed by you, and he wants his money secured and what kind of security have you to give him." (Tr. 400.)

LEO KRAVITZ

DIRECT EXAMINATION

Q. At the time that the pledges were being run off on the adding machine, what was Mr. Kleinman doing, if anything? (Tr. 287.)

A. He was outside reading a paper, or sitting at a desk there at the door.

Q. When you say outside, you mean outside the office?

A. Outside the office.

Q. Was he walking around at that time?

A. Just as usual, he always walks around, walks up and down always.

Q. When you say "just as usual, walks up and down all the time," would you describe that to the Court.

A. *I have known him, have been very close to him for about five or six years, and he always walks and holds his hand on his head and just walks all the time. I was at his home, was at San Francisco, and he does the same thing.*

Q. Did you notice whether or not Mr. Kleinman appeared to be nervous on that occasion when the pledges were being set aside for him? (Tr. 288.)

A. *Not more than any other time.*

Q. BY MR. CHOTINER: Did you notice whether or not Mr. Kleinman was excited on that occasion?

A. No sir. (Tr. 289.)

ROBERT SEGO

DIRECT EXAMINATION

Q. Did you ever have any conversation with Mr. Kleinman or talk with him about there not being money in the cash drawer?

A. There were occasions, a few occasions.

Q. What did he say, if anything, after that?

A. He didn't say very much. He would walk away, put his hand behind his back, or behind his ear, and scratch the back of his head. (Tr. 342.)

CROSS-EXAMINATION

BY MR. DIENSTAG:

Q. I am quite interested in this habit of Mr. Kleinman's of putting his hand on the back of his head. Did you say he rubbed or scratched? (Tr. 343.)

. . .

Q. Where was it you first noticed this habit?

A. I noticed it at the Provident.

Q. When you first went there?

A. Yes.

Q. In any event, a year and a half before the time the Provident closed up, there was Mr. Kleinman rubbing the back of his head and walking up and down?

A. Walking up and down, or walking in a circle.

Q. Oh, he was walking in a circle, too?

A. Yes.

Q. *At that time, when you first went there, Mr. Sego, and he was walking up and down or in a circle,*

and rubbing the back of his head, there was plenty of money in the cash drawer?

A. *When I first came up there?*

Q. *Yes.*

A. *Yes. (Tr. 344.)*

SOL ZEMANSKY

DIRECT EXAMINATION

Q. BY MR. CHOTINER: Did you have a conversation with Mr. Kleinman regarding a reduction of his salary?

A. If I recall it, I think he volunteered to cut his salary.

Q. What was he receiving at the time?

A. \$75 a week.

Q. To what was it cut?

A. To \$50, I believe.

Q. What did Mr. Kleinman tell you when he volunteered to take a cut in salary, if anything?

A. Well, he said that business was quiet and he figured everybody should work to reduce the expense.

Q. Did he say anything else regarding that subject matter?

A. I don't recall anything else.

Q. For the purpose of refreshing your memory, did he tell you that he was of the opinion that conditions, as they then existed in the business, could not last, in substance or effect? (Tr. 208.)

A. I don't recall that.

Q. BY MR. CHOTINER: Did Mr. Kleinman say anything to you at that time regarding the subject (Tr. 208) of whether or not the business could pay him \$75 per week?

A. I don't recall that.

Q. For the purpose of refreshing your memory, isn't it true that Mr. Kleinman told you that the business did not justify paying him \$75 per week?

A. I don't recall that. (Tr. 209.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. Now, Mr. Zemansky, after Mr. Kleinman had been working for some little time, do you recall whether there was any change in the condition of his health?

A. Yes, he was having some trouble with his leg and I think with his breathing, his lungs. (Tr. 239.)

Q. And do you recall that sometime in May, 1938, he told you that he desired a vacation or he wanted to be relieved of part of his duties?

A. Yes.

Q. He told you he didn't desire to come into the place of business quite as early as he formerly had?

A. That is right. (Tr. 239.)

Q. At that time didn't he state that the amount of sales or the amount of merchandise that had been given him to sell had so diminished it didn't require quite as much of his time?

A. That is right. (Tr. 240.)

Q. BY MR. WOLVER: He said that at that time he desired his salary to be reduced from \$75 to \$50?

A. Yes.

Q. He did leave your employ at the end of 1938?

A. No, I don't think so. I think he was there in 1939.

Q. BY MR. WOLVER: Do you recall that Mr. Kleinman did leave at any time?

A. No, unless he left town for a short period, but I believe he was still in our employ up to the July situation. (Tr. 240.)

DAVE ZEMANSKY

DIRECT EXAMINATION

MR. CHOTINER: Q. Did Mr. Kleinman give any reason why he would not take the \$75?

A. He told me there wasn't enough business up there. (Tr. 351.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. When you first started to work at the Provident Loan, did you get \$75 a week salary?

A. Yes sir.

Q. And was that later reduced to \$50 a week?

A. I reduced that salary myself.

Q. When was it that you reduced the salary to \$50 a week?

A. I reduced that salary to \$50 a week when Mr. Sol Zemansky asked me to do him a favor and to stay with him because he would be busy going up the coast, and he didn't like to see me leave him, if I only can give him a little time and be around there he will appreciate it if I stayed there.

Q. When was that; was that in 1938?

A. No, that was when I left him in 1939.

Q. Then you came back to work for him in 1939, is that right?

A. Yes sir.

Q. That was when you volunteered to take a reduction of salary to \$50 a week?

A. I volunteered, I told him, I said, "Mr. Zemansky, I can't stay around here; I got to be away; my health is not in good shape, and I want to take my time, I want to come in as often as I want and any time that I want to, but it would not be fair to draw the same salary."

Q. Did you tell Mr. Zemansky that the business could not afford to pay you \$75 a week?

A. No sir, Mr. Zemansky told me, "Sam, let's not talk about salary; you can come in and draw (Tr. 396) the same salary if you want to"; but I said that wasn't fair. (Tr. 397.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. When was it that he started to assist in the loan department?

A. Well, I should judge sometime around about 1937, 1936 or '37. (Tr. 100.)

Q. Was there any reason as to why he started to assist in the loan department at that time?

A. No particular reason.

Q. Well, was he busily engaged full time in disposing of merchandise?

A. No, he was not fully engaged.

Q. Then, as a matter of fact, Mr. Zemansky, is this true, *that he started to assist in the loan department when the disposition of jewelry as a result of unredeemed purchases became rather slack so that was not taking up enough of his time; is that correct?* (Tr. 101.)

Q. BY MR. CHOTINER: Is that true?

A. Yes.

Q. Now, during 1938 and 1939, was Mr. Kleinman's time devoted mostly to the disposition of jewelry or acting as a loan clerk? (Tr. 101.)

A. It was equally divided.

Q. BY MR CHOTINER: In 1938 and 1939?

A. Yes. (Tr. 101.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Then in 1938, the amount of merchandise that they were giving you to sell was beginning to fall off, was it?

A. No, I don't believe so.

Q. Were they giving you as much merchandise to sell in 1938 as they had given you when you first started to work up there?

A. They just simply didn't want to give it to me. (Tr. 415.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. And Mr. Kleinman, when he would be busy in making loans there, and acting as a loan clerk, would appraise the jewelry and then go to the cash drawer for the purpose of withdrawing sufficient money in order to make the loan, is that correct?

A. Yes sir.

Q. *And were there occasions when there was not sufficient money in the cash drawer to make the loan?*

A. Yes. (Tr. 102.)

Q. *Mr. Zemansky, did you ever talk over your financial condition with Mr. Kleinman, regarding the money that was owing to various creditors?*

A. *No, I don't believe I did.*

Q. Was the subject of the Simons' Lunch Room and the Robert J. Gans matter ever discussed with Mr. Kleinman prior to your giving him the security?

A. I can't recall. (Tr. 104.)

Q. As a matter of fact, didn't you send Mr. Kleinman over to talk with the Simons people or Robert Gans regarding their accounts?

A. That was *after* our transaction with Mr. Kleinman.

Q. That was *after* the security transaction, is that correct?

A. That is right.

Q. Was there ever any discussion with Mr. Kleinman prior to the security transaction as to the amount of money that was owing by you?

A. I don't recall. (Tr. 105.)

Q. Well, Mr. Kleinman knew that the Provident Loan Association was short of money insofar as making loans was concerned, didn't he? (Tr. 105.)

A. Being in the loan department, he had access to the cash drawer and he would know whether we were short of money or not. (Tr. 105.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. You were only dealing in money to loan to others, isn't that so?

A. Yes. (Tr. 247.)

Q. When your business was good and you had a great number of loans, that is the time that you were short on cash?

A. That is correct.

Q. If business was bad, you would have a lot of cash on hand?

A. Well, that would be the way it would operate.

Q. So at the various times that you told Mr. Chotiner that you were short on cash was when your business was good? (Tr. 248.)

A. Well, I could not answer that question in view of the present circumstances.

MR. WOLVER: I will withdraw the question.

Q. *In the light of what you knew at that time, at the time you asked for the loans from Mr. Kleinman, did the lack of money, the available cash in the cash drawer, indicate that the loan business was good?*

A. Yes. (Tr. 248.)

SOL ZEMANSKY

RE-DIRECT EXAMINATION

Q. Directing your attention to your examination and testimony on cross-examination that when business was good, you were short of cash. Now, every time that you were short of cash within six months prior to February 24, 1939, was that a result of business being good? (Tr. 267.)

THE WITNESS: I imagine the rule would be, business would be good. In this case it wasn't. (Tr. 267.)

SOL ZEMANSKY

RE-CROSS EXAMINATION

Q. Mr. Zemansky, in answer to Mr. Chotiner's question you stated that the lack of money during the last six months was not by reason of good (Tr. 268) business. Did you know it at that time, during this six months period? Or during that period prior to

February 24th, did you know at that time that the lack of money was due to no reason other than good business?

A. I knew we were refusing business. Loans were being offered, but we were unable to make them.

Q. Was that because a great number of loans were being presented to you?

A. No more than the regular average. (Tr. 269.)

Q. Now, do you recall when it was that an attachment was levied on the business by Simons' Lunch Room people?

A. Sometime the early part of March.

Q. That was *after* the first security had been given to Mr. Kleinman, is that correct?

A. Yes.

Q. BY MR. CHOTINER: Mr. Zemansky, did you *ever* tell Mr. Kleinman that the Simons' Lunch Room people were going to sue and attach?

A. *No*.

Q. Was that subject ever discussed with Mr. Kleinman at any time *prior* to the attachment?

A. *No*.

Q. At any rate, did you discuss with Mr. Kleinman the fact that you owed the Simons' Lunch Room people some money?

A. I don't recall it.

Q. Did you tell Mr. Kleinman that Judge Pacht was keeping after you, in substance and effect, to make payments to the Simons' Lunch Room people?

A. That was *after* Mr. Kleinman had secured the collateral.

Q. How soon after was it as you can best recall it now?

A. Well, it would be immediately *after* the attachment. (Tr. 164.)

Q. And when was the attachment made?

A. Sometime the early part of March. (Tr. 165.)

Q. BY MR. CHOTINER: *Was Mr. Kleinman present at the time the representative of the Sheriff's office was there?*

A. I believe he *was in San Francisco* at the time of the attachment. He came down afterwards.

Q. Did you have a conversation with Mr. Kleinman regarding the matter of an attachment levied by the Simons Lunch Room?

A. Yes, I talked to him long distance and he came back from San Francisco.

Q. After he came back from San Francisco, (Tr. 165) after your long distance call, did you have another conversation with him regarding it?

A. Several of them. (Tr. 166.)

Q. How soon after the attachment was levied was it?

A. I believe it was within a day or two. (Tr. 166.)

Q. Was there a conversation held with Judge Pacht in the presence of Mr. Kleinman? (Tr. 166.)

A. I believe there was.

Q. What was that conversation?

A. That was in reference to getting the attachment removed.

Q. What was said by the various parties?

A. I can't recall what was said. We went there for one purpose, to get the attachment removed.

Q. Can you tell us in substance and effect what each of the parties stated?

A. Naturally they said they were not going to take it off.

Q. What did you or Mr. Kleinman say, if anything?

A. We tried to work out a deal to get them to remove the attachment.

Q. Did Judge Pacht ask you in the presence of Mr. Kleinman for the payment of the money that was owed to Simons Lunch Room?

A. I don't recall whether he did. (Tr. 167.)

Q. BY MR. CHOTINER: Did you say anything to Judge Pacht in the presence of Mr. Kleinman as to your ability to pay the money at that time?

A. He asked for it and I wasn't able to give it to him, so there wasn't much more to be said. (Tr. 167.)

Q. BY MR. CHOTINER: Mr. Zemansky, can you tell us now in substance or effect what you said and what Mr. Kleinman said?

A. We decided that the only way we were going to get anywhere was to try and secure them.

Q. What did Mr. Kleinman say about that subject, if anything?

A. He thought that was probably the best thing to do.

Q. Did you discuss with Mr. Kleinman where you were going to get the security to give the Simons Lunch Room people?

A. Yes. (Tr. 170.)

A. Mr. Kleinman said we could use some of his loans in order to expedite the matter and get the Sheriff out of the place.

Q. Did you do that?

A. I believe that was done.

Q. BY MR. CHOTINER: Had you ever asked Mr. Kleinman's advice regarding financial matters concerning the company prior to the giving of the first security to him? (Tr. 171.)

A. No. (Tr. 171.)

Q. At the time you went to Judge Pacht's office, the first time there, when you say Mr. Kleinman accompanied you, was the subject matter discussed in Mr. Pacht's office regarding the Gans account?

A. I am not certain as to that.

Q. Did you ask Mr. Kleinman to accompany you to Judge Pacht's office?

A. Yes.

Q. When you asked him that what did Mr. Kleinman say, if anything?

A. He said he would be pleased to go with me.

Q. Why did you ask Mr. Kleinman to accompany you? (Tr. 172.)

A. Well, he was associated with me in the business and I thought I could rely on him for some suggestion he might have to offer. (Tr. 172.)

Q. When you had your telephone conversation with (Tr. 172) Mr. Kleinman, did you ask him to come back to Los Angeles?

A. Yes.

Q. What did Mr. Kleinman say to that, if anything? (Tr. 173.)

A. I thought he said, "*Why don't you do the same with Simon as you have done for me?*" but I am not certain as to that. (Tr. 173.)

Q. BY MR. CHOTINER: Mr. Zemanksy, *did you ever ask Mr. Kleinman for any suggestions as to how you were going to work out your financial problem at the Provident Loan Association?* (Tr. 174.)

A. No.

Q. BY MR. CHOTINER: *Did you ever ask his advice regarding that subject matter?* (Tr. 175.)

A. No.

Q. BY MR. CHOTINER: Mr. Zemansky, prior to (Tr. 179) the giving of the security to Mr. Kleinman, did you discuss your business with him?

A. Yes. (Tr. 180.)

Q. And extending what period of time?

A. Oh, probably over a period of six or seven months.

Q. Prior to the time he obtained his security?

A. Yes. (Tr. 180.)

Q. What were the conversations?

A. *Just that we probably could do more business if we had more money.*

Q. What did Mr. Kleinman say regarding that?

A. There wasn't anything said.

Q. Was that the extent of the conversation that you had with him on each one of those occasions?

A. Well, that is about the substance of it. (Tr. 180.)

Q. BY MR. CHOTINER: Why did you tell that to Mr. Kleinman? (Tr. 181.)

A. Yes, I told him we were refusing loans.

Q. BY MR. CHOTINER: *What did you tell him when you said you were refusing loans?*

A. *We could make more loans if we had more money.* (Tr. 181.)

Q. Was anything said as to why you didn't have sufficient money to make loans?

A. No, there wasn't anything said at the time, that I recall.

Q. Did Mr. Kleinman ask you why you didn't have sufficient money to make more loans?

A. I don't recall that he did.

Q. Was that subject matter discussed in any fashion whatsoever with him? (Tr. 181.)

A. No, nothing other than we were refusing business, it was really too bad we had to refuse business when we had such excellent opportunities to get the merchandise. (Tr. 182.)

Q. BY MR. CHOTINER: For the purpose of refreshing your memory, isn't it true that Mr. Klein-

man told you, "How do you expect us to make loans when there is no money in the cash drawer?"

A. There was a conversation in reference to that, but I don't recall how it came about.

Q. Did your conversation take place before or after the security was first given to Mr. Kleinman?

A. I believe it was before and after, both. (Tr. 209.)

Q. Now, for the purpose of refreshing your memory, isn't it true, Mr. Zemansky, that for a period of two weeks you kept putting off Mr. Kleinman so far as giving him security was concerned? (Tr. 218.)

A. It may have been that period. I talked to him, but I wouldn't say I was putting him off. (Tr. 218.)

DAVE ZEMANSKY

DIRECT EXAMINATION

Q. Mr. Zemansky, did you have any conversation with Mr. Kleiman *after* the security had been given to Mr. Simon *regarding the condition of the Simon account*?

A. Yes sir.

Q. Where did this conversation take place?

A. Over at the Main Street store.

Q. *And when?*

A. Well, it was different times *after we entered into the new contract with the Simons' Dairy Lunch.*

Q. *Did any of those conversations take place before the Simons' security was set aside for them?*

A. No, sir, I don't think so. (Tr. 502.)

BY THE REFEREE:

Q. *Calling your attention to the day when Simons actually attached, do you now recall that you had any conversation with Mr. Kleinman before that date, in which you mentioned the Simon's transaction?*

A. *No.*

Q. *You don't remember any such conversation?*

A. *No. (Tr. 509.)*

DAVE ZEMANSKY

RE-DIRECT EXAMINATION

Q. During the last few months of 1938, had there been any checks issued on account of the obligations of Zemansky Brothers, which were returned by the bank because of insufficient funds?

A. 1938? I don't remember.

Q. Were there any in the first part of 1939?

A. There were some checks in 1939 I gave to people and told them to hold them for a day or two before putting them in. That might have been the latter part of 1938. (Tr. 360.)

DAVE ZEMANSKY

RE-CROSS EXAMINATION

BY MR. DIENSTAG:

Q. During this period you did send Mr. Kleinman his checks?

A. Yes sir.

Q. You didn't ask him to hold his checks?

A. Yes, I asked him to hold the check a day or two.

THE REFEREE: When was that?

A. That was in 1939.

Q. When in 1939?

A. *That would be around I think in March. In fact, it was after the new contract.*

Q. (BY MR. DIENSTAG): Mr. Zemansky, directing your attention back to 1932 and 1933 and thereabouts, did you ever have checks come back that you sent out?

A. No sir.

Q. Never any shortage of cash at any time?

A. No sir.

Q. Were you borrowing money from people at that time, new money?

A. Yes sir.

Q. You were always borrowing money in your business?

A. Always borrowing money. That's why I guess we had no checks come back in this business because we were able to meet them all the time.

Q. In other words, at that time you were borrowing money from a good many people, and you could always get about as much money as you wanted and you were always paying interest?

A. Yes sir.

MR. DIENSTAG: That is all. (Tr. 361.)

ABE ZEMANSKY

DIRECT EXAMINATION

Q. Were there any times when you and Mr. Kleinman talked about not having sufficient money on hand to make loans?

A. Not that I know of.

Q. What was that?

A. I don't know anything about it.

Q. Did Mr. Kleinman ever say anything to you about there not being enough money in the cash drawer to make loans?

A. I don't know about that, any time at all. (Tr. 365.)

LEO KRAVITZ

DIRECT EXAMINATION

Q. Prior to the time that Mr. Kleinman first obtained the security, did you ever have any conversation with Mr. Kleinman regarding the subject of there not being sufficient money in the cash drawer?

A. Off and on, yes sir.

Q. What was that conversation or conversations?

A. Well, Mr. Kleinman looked in the cash drawer and there was no money to make a loan. I said, "Well, I will get in touch with Dave," and Dave used to send him up some money.

A. Then if a loan should happen to come in before (Tr. 279) Dave would send him up some money I used

to go to Mr. Kleinman and ask him for the money. (Tr. 280.)

Q. BY MR. CHOTINER: What did Mr. Kleinman say, if anything, on those occasions when you would ask him for money?

A. Get it off of Dave.

Q. Were there ever occasions when you would call up Dave for money and Dave did not send it up, and a customer would come in to make a loan?

A. Yes, and then I would go over and ask Mr. Kleinman for the money.

Q. Did those occasions ever happen?

A. Very often.

Q. And did Mr. Kleinman always give you the money then?

A. Not all the time.

Q. Did Mr. Kleinman ever refuse to give you any money with which to make loans when you asked him for it?

A. Once in a while.

Q. Was that prior to the time that the security was set aside for Mr. Kleinman?

A. Before and after.

Q. Well, for the purpose of refreshing your memory, isn't it true that Mr. Kleinman told you on an occasion before the security was set aside for him, that he had a business proposition he (Tr. 280) would like to submit to the Zemanskys, and you told him there was no sense in doing it, as they didn't have any money?

A. That the Zemanskys didn't have any money?

Q. Yes. Did you ever tell that to Mr. Kleinman?

A. No sir. (Tr. 281.)

Q. Well, did you ever turn down loans because there was not sufficient money in the cash drawer?

A. Yes sir.

Q. Was that before Mr. Kleinman got the security?

A. Yes sir.

Q. And were there very many occasions like that?

A. Off and on.

Q. And did those occasions arise after you had called Dave Zemansky for money?

A. Yes sir.

Q. And did those occasions arise after you asked Mr. Kleinman for money?

A. Yes sir. (Tr. 281.)

Q. BY MR. CHOTINER: Were there occasions when there wasn't very much for the employees to do?

A. Yes sir.

Q. And they would sit around and talk, is that correct?

A. Yes, we used to sit around and talk.

Q. Did you and Mr. Kleinman ever sit around and talk on any of those occasions.

A. We used to talk about diamonds and the loans.

Q. Did you ever talk about the condition of the business at the Provident?

A. Yes, we talked about it.

Q. What was your conversation?

A. The condition of the business and how you are going to make loans.

Q. Who said that? (Tr. 282.)

A. There is no money in the till, Mr. Kleinman used to say that.

A. I said, "Well, Sam, if we can't make any loans, I will get some money off of Dave or get a little money off of you if a loan comes in." In the meantime, a redemption would come in and I would loan that money, and I wouldn't have to ask him. This is just casual talk we used to have all day long.

Q. Did those conversations take place prior to the time that security was set aside for Mr. Kleinman?

A. Before and after.

Q. Now, did you ever have any conversation with Mr. Kleinman before the security was set aside for him, regarding the subject matter of the Zemanskys being able to operate the Tango games.

A. Off and on.

Q. What was that conversation?

A. He used to ask me once in a while if that was going to open up.

Q. What did you say, if anything?

A. I told him they would probably be opened up in about a week or so.

Q. Give us the rest of the conversation.

A. That is about all.

Q. Did you ever talk with Mr. Kleinman about the subject of if the Tango games were operated, that the Zemanskys could work things out? (Tr. 283.)

A. I told him that if the Tango games would open, it would be a great help to the firm.

Q. What did Mr. Kleinman say to that, if anything?

A. He said, "It will be all right."

Q. And did those conversations take place before the security was set aside for Mr. Kleinman?

A. Before and after.

Q. Now, did Mr. Kleinman ever tell you that if the Zemanskys were able to operate the Tango games they could work things out, otherwise they could not? (Tr. 284.)

A. I don't think he told me that. (Tr. 284.)

LEO KRAVITZ

CROSS-EXAMINATION

Q. *During all this period of time, from the end of 1935 until the time that the petition in bankruptcy was filed, there arose occasions, did there not, when there was insufficient money in the cash drawer to make loans?*

A. *Yes sir.* (Tr. 303.)

Q. And that was all through that period?

A. Well, it wasn't as bad.

Q. Well, there was less money, let us say, later on than there was in the beginning?

A. That is right.

Q. But at all times there were occasions when there was insufficient money in the cash drawer to make loans?

A. Yes sir.

Q. On those occasions, you would have to phone Mr. Dave Zemansky, would you not, at 558 South Main Street?

A. Yes sir.

Q. And ask him to bring some cash?

A. Yes sir.

Q. If it was not there, you would ask Mr. Kleinman for some cash?

A. Yes sir.

Q. On a great many occasions, he let you have that, didn't he?

A. Yes sir.

Q. When he let you have that cash, did you give him any receipt for it?

A. I would give him an I. O. U. for it. (Tr. 304.)

Q. And that happened from the end of 1935 until the time that the petition was filed, until the place was closed?

A. Yes sir.

THE WITNESS: Mr. Kleinman first came there in 1935. I don't think I asked him for any money from the start, maybe a year or so, or six months.

THE REFEREE: After he started?

A. Yes sir.

Q. BY MR. DIENSTAG: Then I will correct that. From a period about six months after he started.

A. About six months, or a little better.

Q. That would be about the middle of 1936?

A. That is right. (Tr. 305.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Now, when you signed the contract, you already knew that the Zemanskys were having trouble with the Simons people, didn't you?

A. No sir.

Q. Had you ever heard of any difficulties of any kind with the Simons?

A. No sir.

Q. Didn't you know, Mr. Kleinman, that Judge Pacht had called in Mr. Sol Zemansky within a month's time prior to signing your contract and worked out an arrangement with Mr. Zemansky whereby the rate of interest was going to be cut from twelve percent to six per cent?

A. No sir.

Q. Did Sol Zemansky tell you that he had fixed everything up with the Simons people?

A. No sir.

Q. Didn't he tell you that you had nothing to worry about or that he had nothing to worry about as far as the Simons people were concerned?

A. No sir. (Tr. 410.)

Q. Was that subject discussed so far as the Gans account was concerned?

A. No sir.

Q. Now, directing your attention to the time when the attachment was put on by the Simons people (Tr. 411.) . . . as February 27, when the attach-

ment was run, you were in San Francisco at that time; is that right? (Tr. 411.)

A. Yes, I was in San Francisco.

Q. And you received a telephone call from Mr. Sol Zemansky, is that right?

A. Yes sir.

Q. And he told you "Sam, the Sheriff has placed an attachment here on account of the Simons' account," is that right?

A. No sir. (Tr. 411.)

Q. Now, Mr. Kleinman, was anything said at that time by Mr. Zemansky in that telephone conversation that there was an attachment?

A. No sir. (Tr. 412.)

A. When I got up to the Provident in my office, Mr. Dienstag put his brief case away and Sol Zemansky started to tell us about owing a lot of money to Simons and they attached it, and we got to raise money quick to get the Sheriff out of here.

Q. That was when he told you the Sheriff was in there?

A. Yes.

Q. What did you or Mr. Dienstag say then?

A. Well, Mr. Dienstag didn't say very much, but I did. I said "Sol, why don't you—you say you got a lot of goods on hand—why don't you go to work and pick out some goods, give me a quarter million dollars worth of merchandise and I will go out and sell it."

Q. At the time you told that to Sol Zemansky, you had been selling merchandise for Zemansky Brothers for a period of years, isn't that right?

A. Oh, yes. (Tr. 414.)

Q. They gave you quite a bit of merchandise to sell, isn't that right, and you received a one per cent commission on your sales, isn't that true? (Tr. 414.)

A. Yes sir. (Tr. 415.)

Q. After you got in Judge Pacht's office, there was a conversation held about the Simons' account, was there?

A. Yes sir, they were talking.

Q. What were they saying?

A. Well, Sol Zemansky made some kind of a proposition to Judge Pacht about the money they owed them, and Mr. Dienstag was sitting there and Judge Pacht, Bill Simon and Mr. Lyman, and they (Tr. 417) were discussing the matter; they were discussing the matter, and Sol Zemansky says, made him some proposition to secure his loan.

Q. Who first mentioned the subject about giving security for the Simons' account?

A. Mr. Zemansky. . . . (Tr. 418.) . . . the Judge said "Well, it will be all right; I will be satisfied; but I want you to tell me one thing and I want you to tell me right now, are you solvent before I go any further?" Mr. Sol Zemansky said "We are solvent one hundred per cent." (Tr. 419.)

Q. Now, Mr. Kleinman, did you tell Mr. Zemansky that he could use some of the pledges that had been given to you for security in order to help make up the security for the Simons?

A. When?

Q. At any time?

A. That came up after, after they agreed.

Q. And did Mr. Zemansky ask you if he could use some of the pledges that had been given to you?

A. That came out this way. It was about—it wasn't very long for Mr. Dienstag to leave town and Mr. Dienstag said to Mr. Zemansky, "You got to hurry up because I can't be here any longer and I did all I could for you to help you out." So Mr. Zemansky came over to me and says "Mr. Kleinman, how about using some of your pledges, to replace the exact amount of pledges for Simons, and then we will pick out other pledges for you." (Tr. 419.)

THE REFEREE: Q. Mr. Kleinman, when you had your conversation with Mr. Sol Zemansky, in which he told you that Simons had attached, you said that you said to him "Well, give me a quarter of a million dollars worth of merchandise and I will go out and sell it for you?"

A. Yes sir.

Q. Is that what you said to him?

A. Well, I said I could sell a quarter of a million dollars worth of merchandise in one month.

Q. What did he say?

A. Well, he kind of looked at me and he said, "Well, I will see you later on." I believe later on he said "There's no use trying to sell goods right now. I know if I had to sell goods now in a hurry to satisfy payments, I know how I would sell them. I would rather not sell any goods right now." (Tr. 424.)

Q. Did you have any conversation with any person?

A. Sol Zemansky came in my office.

Q. What was said?

A. He said to me, "Sam you know we owe a little money to Bob Gans." I was surprised, I never knew they owed him any money; so I said, "You owe him money, too?" So he said, "We don't owe him much, but he is a good friend of Simon, Bill Simon," and he came up and asked me if I would not do the same thing as we did with the Simons. So he said, "You see, the pledges we have right now on hand are redeemable very fast, pledges that we have coming in. I would like to exchange pledges with you and give him pledges that don't go out so fast."

Q. Which ones were the ones that would go out so fast, Mr. Kleinman, were they older pledges?

A. Older pledges, old pledges.

Q. Which ones were the ones that didn't go out so fast, new pledges?

A. New pledges, just put in.

Q. What did you say to that?

A. I said, "Well, I don't think there is anything wrong about that," and I let him do it. (Tr. 459.)

Q. BY MR. WOLVER: I am calling your attention to Trustee's Exhibit No. 6, Kleinman's Exhibit 6, calling your attention to June 2nd, when a contract in the sum of \$3,750 was made, and call your attention that no credit was made on that same date upon

the old note as shown by this exhibit; does that recall anything to your mind? (Tr. 470.)

A. Yes sir, I remember that.

Q. What was that?

A. The \$3,750, that was money they owed me in I.O.U.'s and I gave them more money and made out a contract for it.

Q. The I.O.U.'s represented other money?

A. Other money I gave them.

Q. Was that given to them after March 2nd?

A. After March 2nd, yes.

Q. And at the same time you gave them additional money?

A. Additional money and made out a contract for that much. (Tr. 471.)

Q. Now, on February 24th, did you know whether or not he owed money to any other person?

A. No sir, no sir.

Q. Did you know whether he owed any money to any members of the family?

A. Yes, he did. He didn't tell me if he owed them any money, but at that time I remember he said to me, because I am going to loan the next loan, I can't tell just the date when it was, about two or three days before I made the loan to them, he said, "Sam, you see, my sister has got lots of money in the bank and she is getting very little interest." I didn't answer him anything on that, you know, but he said, "I am not so hot to do business with my sister." I said, "Sol, I got lots of money right now on my hands; you owe me a

few thousand dollars in I.O.U.'s and I got extra cash; I can let you have some money for less interest if you want to." He said, "How much less will you charge (Tr. 477) me?" I said, "I will give you some money at less interest, I will let you have money at seven per cent." So he said, "I will let you know." About a week or two weeks later, he came in my office and he said, "Sam, have you still got that money you say you can let me have at seven per cent?" I said, "Yes." He said, "If you make out the I.O.U's and give us the balance in cash, we will make you out a note."

Q. Is that the money that appears here at seven per cent?

A. Yes, exactly.

Q. Outside of Mrs. Harris, did you know that Zemansky Brothers owed money to any other person?

A. I did not, but I always figure any legitimate business owes a little money here and there, you know, but I didn't know they owed anybody any big money.

Q. Do you know, Mr. Kleinman, whether or not Mr. Zemansky did loan any money from Mr. Zemansky's sister, Mrs. Harris?

A. No, no. (Tr. 478.)

THE REFEREE: Just a minute. This wasn't an answer to the question. The question was, when was it that you gave them money on I.O.U's, that's what we want to know.

A. Since I have been there.

Q. Did you give them money on I.O.U.'s after January 1, 1939?

A. Yes sir.

Q. How many times?

A. I should say more than a dozen times.

Q. What is the largest single sum after January 1, 1939, do you remember?

A. The largest one, I believe, one time was a little over \$5,000, one time.

Q. Over what period of time would that occur that they asked you for I.O.U.'s, during what years?

A. I believe that started up sometime — the I.O.U.'s started up sometime in 1936, until about the end of 1939. I gave them before 1936, but not so much, for a day or so and sent it right back.

Q. When you gave them I.O.U.'s, was the cash drawer empty? (Tr. 480.)

A. The cash drawer? I will tell you, they never kept much money in the cash drawer. They always kept \$20 bills, \$10 bills, \$5 bills, and \$1 bills. In other words, at times, if they had a lot of big bills, some people redeemed, like \$500 or a thousand dollars, lots of loans were around there like that, they used to keep it in the vault, and if they had one bill like that they used to keep it in the back of the cash drawer with a clip on it. I asked him once why they did that, and he said they once made a mistake and gave change back for a big bill instead of a small bill. and they did that so it wouldn't happen again.

Q. BY THE REFEREE: That was the reason?

A. That was what was told to me. (Tr. 481.)

SAM KLEINMAN

CROSS-EXAMINATION

Q. What was the total amount of money that you ever loaned them after March 1st on I.O.U.'s?

A. I gave them different amounts; I gave them different amounts, sometimes \$500 sometimes \$1,000, sometimes \$1200.

Q. What was the highest amount you ever gave them after March 1st?

A. About \$1200. (Tr. 488.)

Q. Sol Zemansky told you the reason they did that, they needed money in a hurry in the business, is that right?

A. Yes, he was out of town and he needed the money some place.

Q. *Did he tell you why they needed the money in such a hurry?*

A. *No, I never questioned them; they always needed money.* (Tr. 494.)

EDWARD DIENSTAG

DIRECT EXAMINATION

THE REFEREE: When was it that Mr. Sol Zemansky signed the contract?

A. On February 24th. (Tr. 523.)

Q. Did he sign the notes at the same time?

A. Yes, your Honor. (Tr. 523.)

Q. When was the next time you had any conversation with Mr. Zemansky?

A. I believe it was the evening of February 27th. I answered a ring on the telephone at my home. (Tr. 523.)

Q. After that, did you return to Los Angeles?

A. I returned to Los Angeles the following morning with Mr. Kleinman. (Tr. 524.)

Q. Will you tell us who was there, where it occurred, and tell us the conversation?

A. I went over directly to the Provident Loan Association with Mr. Kleinman, and went into Mr. Kleinman's office. About two or three minutes after we got there, Sol Zemansky came in. Sol said, "Hello, boys" to us, and we both I think said "Hello" to him, and Sam Kleinman said to Sol, "What is this matter, you want twenty-five or thirty thousand dollars?" Sol said, "Well, the Simon boys have placed an attachment on the premises and there is the Sheriff sitting out in the hall." Sam said, "What do you mean, why have they placed an attachment, what have you got to do with them?" Sol said, "We borrowed some money from them some time ago and all of a sudden they had the Sheriff out there." Sam said, "What do you want me for, what do you want me (Tr. 524) down here for?" Sol said, "Well, Sam, we want to raise some money to lift this attachment." Sam says, "Bring some jewelry over here; I can sell as much as you want me to, \$50,000, \$100,000, \$250,000, anything you bring over, and we will lift the attachment." Sol said, "No, Sam, we can't sell it fast that way, we can't get any price for it." (Tr. 525.)

A. And we went up to Judge Pacht's office. (Tr. 527.) Judge Pacht said, "Just a moment, please." Then he and Mr. Lyman and Mr. Simon left the office for five or ten minutes. When they returned Judge Pacht said to Mr. Zemansky, "Assuming that can be done, Sol, before we go any further with this matter at all, there is one thing that I have to know." He said, "There is no use (Tr. 528) entering into any transaction here unless we know your financial condition." He said, "What I want to know is, are you at the present moment solvent or are you not?" Sol said, "I am absolutely one hundred per cent solvent; you don't have to worry about that. Our assets far exceed our liabilities." (Tr. 529.)

ISAAC PACHT

DIRECT EXAMINATION

BY MR. WOLVER:

Q. What is your trade, business or occupation?

A. I am an attorney-at-law.

Q. Judge Pacht, were you present at a conversation had on or about the 28th day of February—on or about March 1st, at your office, at which Mr. Kleinman, Mr. Dienstag, Mr. Sol Zemansky and Mr. Lyman and Mr. Simon were present?

A. I was. (Tr. 510.)

Q. Did any part of that conversation pertain to the solvency or insolvency of Zemansky Brothers or Sol Zemansky?

A. Yes.

Q. Did it pertain to Sol Zemansky or Zemansky Brothers?

A. Zemansky Brothers?

Q. Do you recall that conversation in that regard, Judge Pacht?

A. Yes.

Q. What was it? (Tr. 510.)

A. . . . I stated in substance, "Now, what's the use of prolonging this? If you are bankrupt"—addressing myself to Zemansky, "If you are bankrupt, if you are insolvent, let's know about it now and if my clients have to take a loss on this thing, they will take it and get it over with. If you can't pay your debts in full, tell us so and we will know where to go from there. It is not the first time that a creditor has had to write off an obligation in whole or in part." Mr. Zemansky, Sol Zemansky, who did the talking, as I have no personal recollection as to whether (Tr. 511) one of his other brothers was there or not, I think one of his other brothers was there, said in substance that they were solvent, that they had more assets than liabilities, enough to cover all their liabilities, but they were hard-pressed for ready cash, and if we would give them the time they would pay out. Now, that is in substance what Sol said.

Q. Was Mr. Kleinman there at that time that this was said?

A. Yes. (Tr. 511.)

MR. WOLVER: May it please the Court, we have two other witnesses who were present at that conversation, and who can testify to the same thing. May we have a stipulation, if Messrs. Simon and Lyman were called, they would testify substantially the same as Judge Pacht, as to the conversation?

MR. CHOTINER: So stipulated. (Tr. 512.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. Where were the books of the Zemansky Brothers kept?

A. We had a set of books at the Provident pertaining to anything that happened at the Provident, and then there was also a set of books at the State Loan, at 558 Main Street.

Q. *Where were the books kept that showed these other interests other than the Provident and the 558?*

A. *At the 558 store.*

Q. *You had some property in Glendale; what books was that shown in?*

A. *That was shown in the 558 records.*

Q. What books did you have at the Provident?

A. The pledge books pertaining to the pledge business, and the cash book or day book, a book similar to this.

Q. Did you have any other books at the Provident?

A. No.

Q. What books did you have at 558?

A. We had books pertaining to the business at the 558 store.

Q. *Were these books accessible to Mr. Kleinman, referring to the 558 store books?*

A. *No, not the 558. (Tr. 251.)*

DAVE ZEMANSKY

CROSS-EXAMINATION

BY MR. DIENSTAG:

Q. All of the principal books of your business were kept at 558 South Main Street?

A. That is right. (Tr. 351.)

SOL ZEMANSKY

DIRECT EXAMINATION

THE REFEREE: Yes, all right. Mr. Zemansky, you recall the time, don't you, when Mr. Kleinman said he would go to the Union Bank and borrow some money and loan it to you?

A. That is correct.

Q. Did that come about as a result of just one conversation with Mr. Kleinman, or was it a series of conversations over a period of time?

A. *Well, as a rule, every time I asked Mr. Kleinman for anything he always gave whatever I asked, so it wouldn't take many conversations.*

Q. Well, how did it start?

A. Well, I imagine there was some rush need for the money. I said, "Sam, can you get me some money?" and he said, "I will see what I can do," and went down and got the money. I don't recall what I said I needed the money for.

Q. You don't remember?

A. No.

Q. You mean to tell the Court you don't now recall any of the details of that conversation, except that Mr. Kleinman said he would go and get the money and loan it to you?

A. That was the way it was done.

Q. How often did Mr. Kleinman go and borrow money from some other source other than his own finances, and loan it to you? (Tr. 177.)

A. He loaned me a considerable amount of money at different times. I wouldn't know where he procured it except this one time when he went to the Union Bank to borrow it; otherwise, I never questioned him where he got the money.

Q. You don't remember when it was?

A. It was prior to the date of the execution of that note.

Q. What is the date of that note, gentlemen, does anybody know?

MR. HORN: The note of March, 1938, I believe.

MR. CHOTINER: March 25, 1938. (Tr. 178.)

SAM KLEINMAN

CROSS-EXAMINATION

THE REFEREE: I will ask a question here.

Q. Are you testifying now, Mr. Kleinman, that in your private office in the Provident Loan Company, you had \$1500 in cash in a box in a drawer in your desk; is that your testimony?

A. Yes sir. (Tr. 485.)

DAVE ZEMANSKY

CROSS-EXAMINATION

Q. Mr. Zemansky, you from time to time would borrow money from Mr. Kleinman on I.O.U.'s, I think you so testified?

A. Yes sir.

Q. And Sam would hand you the cash, wouldn't he?

A. Yes sir.

Q. And he would take it out of his desk?

A. Yes sir.

Q. He would take it out of what you might call a strong box?

A. I believe he had an iron box in the desk, but he also had a desk lock. The desk was locked.

Q. What I am getting at, he did take money out of that iron box and he would let you have it?

A. Yes sir.

Q. They were substantial sums sometimes?

A. As a rule, he always used to give us \$100 bills.

Q. You would get five hundred or a thousand dollars from him?

A. Yes, then he would hand me as a rule one hundred dollar bills.

Q. In substantial sums?

A. Yes.

Q. On those occasions when you asked Mr. Kleinman for a loan of money, did you have any difficulty, (Tr. 508) culty, experience any difficulty in getting such a loan?

A. No sir.

Q. As a matter of fact, it was handled very casually, wasn't it?

A. Yes sir; sometimes he would send it down with the colored porter we had up there.

Q. Whenever you were in need of money you would call Mr. Kleinman because you knew that he had been loaning you money and would do so?

A. Yes, and Mr. Kravitz would speak to Mr. Kleinman.

Q. You have testified once before on the stand, I believe, that beginning about the middle of 1936 you had these I.O.U. transactions?

A. Yes.

Q. From that time on, there would never be any difference when you put in a call for money?

A. No sir.

Q. He would give it to you, he would get the money out of the cash box that he had in his own desk?

A. Yes, and then we made it into the \$5,000 notes.
(Tr. 509.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. Do you recall approximately how much he sold for you shortly after he came to work for you, in money? (Tr. 236.)

Q. Was it seven hundred thousand?

A. It probably was in that neighborhood. (Tr. 237.)

Q. Could you tell at any time how much merchandise or how many unredeemed pledges you had on hand?

A. No. (Tr. 254.)

Q. *Did you have large amounts of them?*

A. *At various times we have large amounts.* (Tr. 254.)

Q. *Did that amount to an appreciable sum, such as hundreds of thousands of dollars?*

A. Yes. (Tr. 255.)

SOL ZEMANSKY

RE-DIRECT EXAMINATION

Q. Well, did you have any pledges in your place of business, other than those that had been rehypothecated to other individuals?

A. Yes. (Tr. 267.)

Q. BY MR. CHOTINER: You testified on cross-examination that at various times you had large amounts of unredeemed pledges. Now, then, directing your attention to the period of six months prior to February 24, 1939, did you have large amounts of unredeemed pledges?

A. Not at that time. (Tr. 268.)

DAVE ZEMANSKY

CROSS-EXAMINATION

Q. Your rate of interest during most of that period, Mr. Zemansky, that is, the rate that you charged on these loans, was three per cent, was it not?

A. Yes sir, and it was two.

Q. When referring to those figures, we are speaking of the rate of interest per month, is that correct?

A. Yes sir.

Q. You say it was two per cent?

A. Yes sir.

Q. About how long back, Mr. Zemansky?

A. I think previous to 1934, and then the rate was changed to three.

Q. Then you charged three per cent?

A. Yes.

Q. So from 1934 on, you increased the rate of interest which you were charging to make loans and your income increased correspondingly, isn't that correct?

A. Yes sir.

Q. So that theoretically, as I see it, Mr. Zemansky, as people paid the amounts due, you were getting thirty-six per cent a year on your money that was outstanding?

A. Yes sir. (Tr. 352.)

Q. On all of the money that was out represented by pledges in your vault, you were getting thirty-six per cent per year on loans up to \$300 and two per cent over \$300?

A. Yes sir.

Q. And what was the greater portion of your money loaned out, that is, in what amount did it go out: was the greater amount of pledges under \$300 or over?

A. Over \$300. (Tr. 353.)

Q. And it is a fact, is it not, that you knew after you held pledges for a certain length of time, twelve months, in this particular interest business, you could sell those pledges?

A. Yes sir.

Q. And I believe the practice of your firm was, was it not, to hold them about thirteen months?

A. Sometimes we held them much longer than (Tr. 353) that. Twelve months was the law.

Q. You notified them, let us say, at the end of thirteen months?

A. Fourteen, two months over the law. The law said twelve. (Tr. 354.)

Q. Now, at the Provident Loan Association, Mr. Zemansky, there are a series of show-cases, or were

at that time rather, a series of show cases, I believe they are still there.

A. They are still there.

Q. And in those show-cases were kept jewelry of various kinds and types?

A. Yes sir.

Q. Some pieces of jewelry were extremely valuable?

A. Yes sir.

Q. Platinum watches with diamonds, large bracelets and so forth?

A. All kinds of jewelry.

Q. Those were the property of Zemansky Brothers?

A. Yes sir.

Q. And in the same fashion was jewelry at 558 South Main Street?

A. Yes sir.

Q. And perhaps some of the jewelry was not all disposed of, some of it was in the vault?

A. Yes sir. (Tr. 356.)

Q. Possibly a good portion of that was kept in the Main Street vault?

A. Yes sir.

Q. Was it your practice to keep that kind of jewelry at the Provident office only or principally on Main Street?

A. At the Main Street store we used to clean up the jewelry and take it up to the Provident and display it in the show-cases you mentioned.

Q. Those items of jewelry that were not displayed were kept at the Main Street branch?

A. Yes sir. There was some in the vault at both stores.

Q. You did have some in the vault at the Provident?

A. At the Provident, too. (Tr. 357.)

Q. And of course, the 558 South Main Street we have been talking about, was a loan office?

A. Yes sir.

Q. At that place you loaned the money just as you did at the Provident?

A. Yes sir. (Tr. 357.)

Q. (BY MR. DIENSTAG): Mr. Zemansky, was Mr. Kleinman ever at the 558 South Main Street store, if you know?

A. Oh, yes sir, he came in at different times. (Tr. 358.)

Q. Approximately how much, Mr. Zemansky, did the sales of jewelry by auction amount to in 1939 at 558 South Main Street—well, the records show, if your Honor please. This is a Namson and Young report.

THE WITNESS: It was an unusual amount. I can tell regardless of the records; it was an unusual amount. We ran auctions six days a week, used to take in about \$200, as much as \$300 a day.

THE REFEREE: Q. How long did you run these auctions?

A. Right up to the time of the attachment. (Tr. 506.)

LEO KRAVITZ

DIRECT EXAMINATION

Q. Was there any other place at the Provident where money was kept for the purpose of making loans other than the cash drawer?

A. 558.

Q. That is, 558 South Main Street, you are referring to?

A. Yes sir. (Tr. 277.)

LEO KRAVITZ

RE-DIRECT EXAMINATION

Q. (BY MR. CHOTINER): At the time you set aside pledges for Mr. Gans, were there other pledges in the vault which had not been set aside for any creditor?

A. No sir. (Tr. 334.)

Q. Then where did you get the pledges to replace the ones from the Kleinman account that you had set aside for Gans?

A. There were a lot of \$20 loans, \$15 loans, \$10 loans, and \$25 loans, that we didn't want to put in the Gans transaction.

Q. Then there were other pledges in the vault at that time that had not been assigned to any other creditor; is that correct?

A. Yes sir. (Tr. 335.)

Q. . . . At the time you set aside the security for the Gans account, were all of the pledges that were

in the vault at the Provident Loan Association already set aside for some other creditor with the exception of small loans?

A. No sir.

Q. Then there were some large loans in the vault at that time that had not been set aside for other creditors; is that correct?

A. No, there were a lot of small loans that were not set aside for creditors. (Tr. 335.)

Q. At the time you selected the Gans pledges the pledges to replace the Gans pledges, taken out of Mr. Kleinman's box, there were about 20 or 30 drawers of pledges that were assigned to no one, weren't there?

A. Yes sir. (Tr. 336.)

Q. And there are a lot of those pledges in one box, aren't there?

A. Yes sir.

Q. Possible a couple hundred in a box?

A. 200 or more. (Tr. 337.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. What did Mr. Zemansky say, if anything?

A. Mr. Zemansky said to him, to Mr. Dienstag, "Well, you see, Eddie"—he called him Eddie; he said "Eddie, we are in all kinds of enterprises; we need a lot of money. We have a lot of pledges in the Loan Department, a lot of them, and I would like to give him security in loans, but there is a law where a pawnbroker cannot re-loan any pledges." (Tr. 401.)

Q. Did you know what interest Zemansky Brothers were getting on those various pawns? (Tr. 482.)

A. They were getting three per cent, and they had another stamp they used, stamped on the back, "Minimum interest up to \$5 is 50 cents," and then they had a stamp where it showed two per cent for different amounts of money, and then they had another stamp that showed where they were getting three per cent.

Q. Three per cent on what amount? (Tr. 483.)

Q. What loans did they get two per cent, if there were any such loans?

A. Over \$200.

Q. Over \$200 they got two per cent?

A. Yes. (Tr. 483.)

Q. After you went to work for them, they had a place at 558 South Main Street and one at Seventh and Hill?

A. Seventh and Hill, yes.

Q. As an employee, did you have the opportunity between 1935 and December, 1938, to go into their vaults?

A. Yes.

Q. Did you notice the number of pledges they had on hand?

A. Well, only a few times, I used to go in there.

Q. And did you also know how many of these pledges were not redeemed, the pledges forfeited?

A. I never looked at them.

Q. Did you know pledges were being forfeited?

A. Oh, yes, yes.

Q. Did you sell some of those forfeited pledges?

A. Hundreds of thousands of dollars of them.

Q. Did you ever have a conversation with them concerning the sales that you had made? (Tr. 484.)

A. Well, he told me one time that they had over a hundred thousand dollars, about a quarter million dollars worth of merchandise, to sell and they didn't sell any and they were glad they didn't, because they turned them over to me and I got better prices. (Tr. 485.)

EDWARD DIENSTAG

DIRECT EXAMINATION

BY MR. WOLVER:

Q. Mr. Dienstag, when did you first discuss with any of the Zemanskys the question of loans owed by the Zemanskys, or notes owed by Zemanskys to Mr. Kleinman?

A. The middle of February of 1939, about the 10th or 11th or 12th.

Q. Now, Mr. Dienstag, will you tell us who was present, where it occurred and give us the conversation in substance or in words?

A. The conversation took place at the Provident Loan Association in Los Angeles at 706 South Hill Street. There were present Mr. Sol Zemansky, Mr. Sam Kleinman and myself. (Tr. 513.) Sol said, "Well, Ed, as you know, we have various enterprises

throughout the State. We have quite a bit of money invested and we haven't much ready cash. What ready cash we have we can use in our Loan Department here. However, we have several hundred thousand dollars worth of pledges." (Tr. 514.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. At the time those conversations took place, was Mr. Kleinman still selling jewelry that was obtained by failure of redemption?

A. Yes.

Q. And were there very many cases like that during that period of time where customers failed to redeem their property?

A. Well, there was always a certain amount of unredeemed pledges.

Q. Did that run to any great volume?

A. I couldn't say exactly; it was considerable. (Tr. 182.)

SOL ZEMANSKY

CROSS-EXAMINATION

MR. WOLVER: Mr. Zemansky, when a loan was made on a pawn, the amount loaned on the pawn never equalled the value of the pawn?

A. No.

Q. It would be, in all events, less than the value of the pawn?

A. Yes.

Q. And whenever Mr. Kleinman sold pawns for you, he always sold them at an amount greater than the amount you had in them by reason of prior loans?

A. There may be an occasion when we had a loss. (Tr. 260.)

Q. Do you recall any such case?

A. No.

Q. Would it be fair to say with the exception of a possible few occasions, all other pawns were sold by him, any redeemed pawns, were sold at a profit?

A. Yes. (Tr. 261.)

DAVE ZEMANSKY

CROSS-EXAMINATION

Q. Now, Mr. Zemansky, you didn't loan the full value of the property, did you, to people?

A. No sir. (Tr. 354.)

Q. So that if it became necessary to sell that pledge, it would bring in more money than the amount that you loaned?

A. Yes sir. (Tr. 354.)

Q. Would you say now, in your opinion as a loan clerk (Tr. 386) and such degree of expert opinion that you may have, as a rule you got more money for the pledge than the amount you loaned on it?

A. We did in the last few years. (Tr. 355.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Do you know whether they would loan the full value of the diamonds or a lesser sum?

A. The full value in the loan department? Nobody gives a person the full value of the diamonds. They always loan less than its real value.

Q. Do you know how much less it would be?

A. Oh, sometimes they gave—it depends on the merchandise. If it is good merchandise they could give him as high as 75 per cent.

Q. But not good merchandise?

A. They would give him about 50. (Tr. 481.)

Q. Did you know that prior to February 24, 1939? Did you know before February 24th, when you entered into this contract, that the pawns that were taken in by Zemansky Brothers were worth considerably more than the loans they had made on them?

A. Oh, yes, yes. (Tr. 482.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. BY MR. CHOTINER: For the purpose of refreshing your memory, isn't it true that Mr. Kleinman told you that if you were able to operate the Tango games, you could work things out, otherwise you could not?

A. I don't recall any such conversation. (Tr. 210.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. The Zemansky Brothers had other property in addition to the Provident Loan and the State Loan?

A. Yes, they had some other interests.

Q. And *what were those other interests at that time?* (Tr. 250.)

A. I don't know what they all were. They are in the original schedule of holdings. (Tr. 251.)

Q. Did you have an interest in the 333 Club at El Cerritos, California?

A. Yes.

Q. And how long did you have that interest? (Tr. 252.)

A. About three or four years.

Q. Do you have an interest in the Playhouse Fascination at Butte, Montana?

A. Part of an interest my brother Joe had. (Tr. 252.)

Q. You had an interest, the partnership had an interest, in the Club Fortune?

A. Yes.

Q. And that is located at Reno, Nevada?

A. Yes sir. (Tr. 252.)

Q. How long have you had that interest?

A. Three years.

Q. The partnership had an interest in the Redondo Properties Corporation?

A. Yes.

Q. And that corporation had considerable real estate?

A. Yes.

Q. How long had you had that interest?

A. About three years.

Q. The partnership had an interest in the Palace Amusement enterprise?

A. Yes.

Q. How long did you have that interest?

A. About four or five years.

Q. The partnership had an interest in the Redondo Palace?

A. Yes.

Q. How long did you have that interest?

A. About three years.

Q. The partnership had an interest in the Neptune at Long Beach?

A. Yes.

Q. How long did you have that interest?

A. About a year.

Q. The partnership had an interest in Robbins' Bingo at Bayshore in San Mateo County, is that correct?

A. Yes sir.

Q. You also owned the real estate there?

A. Yes.

Q. And how long did you have that interest?

A. About four years.

Q. BY MR. WOLVER: The partnership had an interest in the Boulevard at Belmont Shores? (Tr. 253.)

A. Yes.

Q. How long had you had that interest?

A. About two years.

Q. The partnership had an interest in a piece of real property in Glendale bordered by San Fernando, Los Feliz and Central Avenue?

A. Yes. (Tr. 254.)

Q. What was the cost of that piece of property (Tr. 254.)

A. \$120,000.

Q. BY MR. WOLVER: How long did you have that place?

A. About 15 years. (Tr. 254.)

Q. BY MR. WOLVER: How long did the partnership have it?

A. About 15 years. (Tr. 254.)

LEO KRAVITZ

RE-DIRECT EXAMINATION

Q. Now, during the times that you would talk with Mr. Kleinman at the Provident, did you ever talk to him about the Tango business in which the Zeman-skys were interested?

A. Off and on, yes sir. (Tr. 336.)

A. Used to talk to him about El Cerritos, if they ever got going, they would make a lot of money there.

Q. What did Mr. Kleinman say about it?

A. "I am glad to hear it."

Q. Was anything else said by you or Mr. Kleinman about the Tango business operating?

A. He knew it was a very good business when they got going. (Tr. 336.)

Q. And the Tango business was mentioned?

A. Tango.

Q. Or the other amusement enterprises of the Zemansky Brothers. It was well known that they were in the amusement business, was it not?

A. Yes sir.

Q. Especially among the employees?

A. Yes sir.

Q. And was the general opinion which was expressed to you by the other employees and yourself to them that that was a very profitable business when it was running?

A. Yes sir. (Tr. 337.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. BY MR. WOLVER: Mr. Kleinman, during the time you were employed at Zemansky Brothers, did you ever hear any discussions occurring there of other interests?

A. I never talked to anybody and I never had much time to discuss with the employees down there about any of the Zemansky business.

Q. Did you know that they were engaged in other enterprises other than pawnshops?

A. Yes sir.

Q. Did you ever discuss with any person their estate in Reno? (Tr. 472.)

A. Well, that was known around the office to everybody, the business in Reno.

Q. Did you ever discuss that with any of the Zemansky boys?

A. The time when they fixed that place up, the time when they fixed that place up, Sol Zemansky said, "This is going to be a gold mine."

Q. Did he ever discuss with you whether or not he was making money on that place after that?

A. Yes, he said they are making money.

Q. What period of time did he tell you they were making good money in Reno?

A. Oh, right along, even the last month or so before they closed up the place.

Q. That would be in June of 1939, he said they were making good money in Reno?

A. Yes, they were making money.

Q. Did he ever discuss with you El Cerritos, that is the 333 Club?

A. I tell you, I don't remember it by the name, but I know just about where it was, yes.

Q. This would be in Oakland, is that right?

A. In Oakland. I was out to that place myself.

Q. Did he say anything to you about that place?

A. He said the first month we opened we got out our money out of it, now, it is clear.

Q. Did he ever discuss with you the Play House in Butte, Montana?

A. I understood they had one down there, but I don't remember if he did or not.

Q. Going back to this place in Oakland, did he (Tr. 473) discuss with you after you were there, did he ever tell you how much they were making there?

A. I was there, I believe, with Mr. Dienstag, when I was in San Francisco. Mr. Dienstag drove me out there.

Q. Did he ever tell you how much he was making there?

A. He said business was very, very good.

Q. Over what period of time did he discuss that with you?

A. Oh, it is hard to tell, you know, I never asked him too much about his personal business. When he told me I just listened to it.

Q. Over what period of time did he discuss the Play House in Butte, Montana, with you?

A. He told me that that place is doing pretty good, I think it will do just as good as in Reno.

Q. He told you that Reno was making a lot of money?

A. A lot of money, yes.

Q. Did he ever discuss the Redondo property with you, his Redondo property?

A. Yes, when I was out driving with him, he wanted to go to Ocean Park and from there he drove down to Redondo, and from Redondo he wanted to go down to Seal Beach, wanted to look at some property there and I was with him, you know, and he said to

me at Redondo, "You see that piece of property right there, we bought it from the Southern Pacific." (Tr. 474.)

Q. Did he tell you how much money he was making?

A. Oh, yes.

Q. He was making from that property?

A. He said that property paid right off real good, the minute he bought it.

Q. Over what period of time did he discuss with you the Redondo property?

A. Not many times.

Q. Was it after January of 1939?

A. Oh, right along, yes.

Q. Was it after March of 1939?

A. He used to come in my office and talk until about the last month before they closed up.

Q. And he continuously told you he was making good money on all these properties?

A. On all these properties.

Q. Did he ever discuss with you the Palace of Amusement Enterprise?

A. I will tell you, they had so many places I don't remember exactly every one of them.

Q. Do you remember the Neptune at Long Beach?

A. Yes, I remember that one.

Q. Did he ever tell you anything about the Neptune?

A. I was there with him.

Q. About when were you there with him?

A. I was there with him, I believe, I don't remember, it must have been around 1937 when I was there with him.

Q. Did he tell you what he was doing there then? (Tr. 475.)

A. He said they are doing pretty good.

MR. CHOTINER: Was that in 1937 you are referring to?

MR. WOLVER: Yes.

Q. Did he discuss that Palace of Amusement with you after 1937?

A. I believe after that he told me, or Abe told me, they closed that up, they got their money out of it, made a profit and closed it up.

Q. Do you remember discussing with him the Bay Shore property?

A. The Bay Shore property?

Q. Yes.

A. I believe I saw the Bay Shore property, but they didn't run it when I saw it.

Q. Did he ever tell you they made money there?

A. Oh, yes, he said they made money on that, made more money down there than any other place except Reno.

Q. How late did he tell you that?

A. Bay Shore? Bay Shore was pretty early I don't believe it was in 1938.

Q. It was before 1938?

A. Yes.

Q. He told you they made plenty of money?

A. Yes, he always made money in that place.

Q. Did he ever discuss with you the Boulevard at Belmont Shores?

A. No.

Q. Did you ever discuss with him any property out in Glendale?

A. Yes, I knew all the time. (Tr. 476.)

Q. What did he say about that?

A. He said, "We have a fine piece of property down there." He said, "It cost us \$125,000, and we will put up a building there," what do you call it for boxing?

Q. An arena.

A. No, no.

Q. Ring?

A. A boxing ring in Glendale.

Q. Did he say how much that property was worth?

A. He told me that cost them \$125,000. (Tr. 477.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. *At the time that you first gave security to Mr. Kleinman, did your liabilities exceed your assets?* (Tr. 182.)

A. *Well, I did not know.*

Q. BY MR. CHOTINER: *Did you ever know?*

A. *Not until the bankruptcy.*

Q. When you say "*not until the bankruptcy,*" do you mean at the time you filed your petition for arrangement under Chapter 11?

A. *That is correct.*

Q. *Was that the first time that you ever knew that your liabilities exceeded your assets?*

A. *That was about the first time.*

Q. When you say that was about the first time, can you tell us when was the first time that you knew your liabilities exceeded your assets?

A. *Well, I never knew definitely insofar as there was no way for me to determine it. (Tr. 183.)*

Q. When did you first find out that your liabilities exceeded your assets? (Tr. 183.)

A. The only time I could say was when people were pressing me for money, I didn't have enough money to pay them off at one time.

Q. When did they start pressing you for payment?

A. Probably six months or so of the petition.

Q. Did anyone press you for payment prior to six months before filing your petition?

A. Yes, I had people pressing me, but I was always able to take care of the obligations. (Tr. 184.)

Q. BY MR. CHOTINER: Did you have money on hand to meet obligations when you were pressed for payment at a period prior to six months before the filing of your petition?

A. Yes.

Q. Where did you get the money to meet those obligations?

A. Just refused loans, refused loans in the loan department. (Tr. 184.)

Q. BY MR. CHOTINER: *Do you know approximately what the total of your obligations was, of Zemansky Brothers, at the time the security was given to Mr. Kleinman?*

A. *I didn't know.* (Tr. 184.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. *During that six months period prior to February 24, 1939, when you were refusing new loans for lack of money, did you know that the lack of money was a result of any condition in regard to your business other than it was from the condition prior to that six months period?*

A. *I didn't know.*

Q. How long did it take you to prepare your schedules in this case, your bankruptcy schedules?

A. I don't know the dates. It was filed in a skeleton way.

Q. *You didn't have that information available until you started to prepare these schedules?* (Tr. 269.)

A. No.

Q. You didn't know your financial condition prior to that time?

A. No. (Tr. 270.)

DAVE ZEMANSKY

DIRECT EXAMINATION

Q. And at that time you found out, or at least you knew, that Zemansky Brothers owed approximately over one million dollars, isn't that right?

A. Yes sir, at that time.

Q. Was there any substantial change in the amount of money that was owing by Zemansky Brothers within a period of one year prior to the time you filed the petition?

A. I wouldn't say any large amount.

MR. CHOTINER: Q. How much did it vary during that year, do you know? (Tr. 346.)

Q. Well, did it vary more than \$200,000?

A. Did you say \$200,000, I don't know for sure, but I would presume it would not be that much.

Q. Mr. Zemansky, in this proceeding, did you ever see the schedule of assets that was owned by Zemansky Brothers. (Tr. 348.)

A. Yes, sir, later on, in the inventory.

Q. Was there any substantial difference between the total of those assets at the time you saw them and within a year's time prior to that?

A. *As I say, I don't think there could be very much difference in the last year.*

Q. When you say there couldn't have been much difference in the last year, could it have depreciated more (372) than a couple of hundred thousand dollars?

A. Not more than that. (Tr. 348.)

BY MR. CHOTINER:

Q. Now, bearing in mind the amount of interest that you paid during the year, are you able to tell us approximately what the total amount of principal there was owing by Zemansky Brothers? (Tr. 345.)

A. I never did run it off. During every month there was some money coming in and some money to go. Sometimes we paid, sometimes we received money.

Q. *Within a couple hundred thousand dollars, can you tell us approximately how much the firm owed?*

A. No. (Tr. 346.)

MR. CHOTINER: Q. At the time the petition was filed under Chapter 11 of the Bankruptcy Act, did your assets consist of more than fifty per cent of your liabilities?

A. I wouldn't know? (Tr. 348.)

DAVE ZEMANSKY

CROSS-EXAMINATION

Q. *Mr. Zemansky, all of this time that you were signing the checks, did you know how much money you owed, that is, that the business owed?*

A. No sir.

Q. *You had no idea?*

A. No. sir.

Q. Did you know how much money you had out on pledges?

A. No sir.

Q. *So you don't know how many pledges you had in the vault drawing interest?*

A. *No sir.*

Q. *Except from the fact that you took in certain sums every day?*

A. *We didn't give it much thought. If we got any new money or not, we were always in position to pay. That's the way we went along.*

Q. So all of this time that you were writing these checks, you didn't know how much you had owed, and you also didn't know how many pledges you had in the vault that people were paying you interest on?

A. That is right. (Tr. 351.)

Q. Did you at any time before you were shown a schedule, after a stock was taken of your property on hand by the Trustee, then the Receiver, did you at any time before that time know how much merchandise you had on hand which was not redeemable merchandise, just jewelry?

A. No sir.

Q. So that until the figures were shown to you and an appraisal taken, you did not know how much salable merchandise you had on hand?

A. No sir. (Tr. 356.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. BY MR. WOLVER: *Mr. Zemansky, did you keep a permanent record or any record of any unredeemed pledges?*

A. No.

Q. *Did you keep any inventory of any precious gems or other merchandise on hand?*

A. No.

Q. *Could you tell at any time how much merchandise or how many unredeemed pledges you had on hand?*

A. No. (Tr. 254.)

YATES

DIRECT EXAMINATION

As a result of my examination of the books of the bankrupt, there was no record maintained of the assets or the liabilities, the operation expenses, the net worth and inventory of the assets, and no record of cash reconciliations, nor a record of bank account reconciliations. It was strictly a memorandum record. They would enter the amount of their deposits and the amount of pledges redeemed, amount of new pledges. For example, if I.O.U.'s were issued, there was no record of the I.O.U.'s, there was no record of the amount of cash in the drawer, there was no record of

any reconciliation of the amount of cash in the bank. (Tr. 539.) From the books and records of the bankrupt, the bankrupt could not, nor an auditor could not, determine whether or not the business was making money or losing money, and could not determine whether or not the assets were greater than the liabilities, could not determine whether or not they were solvent or insolvent without making an extensive audit and preparing a report of all operations to arrive at a profit or loss for any given period. (Tr. 539.)

Q. Could a balance sheet have been obtained from the books that were maintained by Zemansky Brothers?

A. No sir. (Tr. 540.)

The Testimony appearing in the record with regard to

“THE QUESTIONS INVOLVED,” Item II.
(DID THE BANKRUPTS HAVE UNRESTRICTED AND UNFETTERED DOMINION OVER THE PROCEEDS OF THE ASSIGNED PAWN TICKETS?)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. At the time when Mr. Dienstag was present at a conversation, will you tell us what the conversation was, if there was any, regarding the subject matter of giving security to Mr. Kleinman?

A. Well, Mr. Dienstag merely explained the situation as to how to handle it from a strictly legal point.

Q. What did he say?

A. About giving Mr. Kleinman the security and working out these contracts and replacing the collateral with other collateral, after the collateral that was up had been redeemed.

Q. That took place before you consented to give the security, is that correct?

A. I believe so. (Tr. 213.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Did Mr. Dienstag say that he could work it out so it would be legal to give pledges for security?

A. No. (Tr. 401.)

A. So Mr. Zemansky says to Mr. Dienstag, "I can show you a pawn-ticket where it has printed on the back of it where the law prescribes that (Tr. 401) I cannot do that." So Mr. Dienstag said, "Well, I am not acquainted with that law, never looked into it, but if you can give me the ticket I will look into it." (Tr. 402.)

Q. Do you remember what Mr. Dienstag was saying about the legal points?

A. Yes sir. (Tr. 404.)

A. He said to him, "Sol, I think you are right, that you cannot take possession of any pawns, of any merchandise that is pawned by you, but I've got a way; I looked up the law and I have a way where we can have security on the pawn-tickets." (Tr. 405.)

Q. Did Mr. Zemansky agree with Mr. Dienstag when Mr. Dienstag said he had a way and explained how it could be worked out?

A. He asked him to work it out and "If you work it out and if it is legal, I am satisfied." (Tr. 406.)

EDWARD DIENSTAG

DIRECT EXAMINATION

Q. Do you recall if you had a conversation with Mr. Zemansky upon your return to Los Angeles? (Tr. 516.)

That conversation took place in the office of the Provident Loan Association, in the office occupied by Mr. Sam Kleinman as his office. Mr. Sol Zemansky was there. I had with me notes on the subject of the

law regarding pawnbrokers' pledges and the re-pledging by pawnbrokers of their pledges and the subject of assignment of accounts receivable. I said to Mr. Sol Zemansky, "Sol, I have got this problem worked out." I said, "I believe under the law, under this Pawnbrokers' Act, which I have looked into, that you cannot give the pledges which contain the jewelry that you have taken from customers to anyone as security, you cannot give up possession without violating that law and committing a misdemeanor. However," I said, "these pledge tickets that you give to the customers constitute a promise on the part of these people to pay you certain sums of money." I said, "You can assign your right to receive this money." I said, "That is a very common (Tr. 516) procedure and it is done all the time and such things are given as security to various finance companies." I then told him that so far as the actual law on the subject was concerned, I could only find three cases in the entire United States of the exact question of giving up the possession of pledges where a statute existed which would permit it. I then had with me notes of the proposed agreement which we finally entered into and read them to him with regard to the various provisions. Sol said, "Ed that seems like the ticket to me; I think that will be all right. Will you prepare the agreement?" I said, "Yes, I will, Sol." . . . "All right, Sol, I will complete this entire contract ready for you to sign, but in order to do so I have to have the numbers of the pawn-tickets and the pledges so that I can type them and put them in the contract." I said, "I am in a hurry to get out of here,

I have got to get back to San Francisco. How soon can you get those numbers?" Sol said, "That's easy," and he walked to the door and called for Leo Kravitz. Leo came in and he said, "Leo, I would like you to pull out about \$100,000 worth of pledges for Sam. (Tr. 517.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Do you remember what Mr. Dienstag was saying about the legal points?

A. Yes sir.

Q. What did he say? (Tr. 404.)

A. He said to him, "Sol, I think you are right, that you cannot take possession of any pawns, of any merchandise that is pawned by you, but I've got a way; I looked up the law and I have a way where we can have security on the pawn-tickets." (Tr. 405.)

Q. Yes, what did he say to that?

A. Well, Mr. Zemansky said to Mr. Dienstag, "Anything you do, if you think it is legal, it is all right; I will be more than satisfied." (Tr. 406.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. BY MR. CHOTINER: Directing your attention to February 24, 1939, and to Trustee's Exhibit No. 4, being the contract dated February 24, 1939, are you familiar with that contract?

A. Partially. (Tr. 200.)

Q. Will you explain to the Court where you were when that contract was signed?

A. In San Francisco.

Q. And who prepared that contract, if you know?

A. I believe it was prepared by Mr. Dienstag.

Q. And had the contract been signed by anyone prior to your signing it?

A. No.

Q. Who presented the contract to you in San Francisco?

A. Well, I believe I received a call one morning when I was at the St. Francis Hotel. Mr. Dienstag phoned me and told me he was in town and wanted to know if I would come down to his office, so I went down to his office and signed the contract.

Q. Did Mr. Dienstag tell you where he had just come from?

A. Well, he had been in Los Angeles.

Q. Did he tell you that?

A. I saw him the day before in Los Angeles.
(Tr. 201.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Was a different contract prepared by Mr. Dienstag, was a white copy of the contract, a finished copy, prepared by Mr. Dienstag?

A. A white copy was prepared by Mr. Dienstag, yes sir.

Q. Do you remember when you signed those copies; I don't mean the date, but do you remember signing those copies?

A. Yes sir.

Q. How many copies did you sign?

A. I signed two copies.

Q. Do you recall how long before you signed these copies it was that this conversation was had when Mr. Kravitz was told to pick out the pledges?

A. It was the next day.

Q. After you signed the copies you gave them to Mr. Dienstag, didn't you?

A. Yes. (Tr. 448.)

Q. Do you recall whether or not, Mr. Kleinman, while you were in San Francisco, you saw a copy of the contract signed by Sol Zemansky?

A. Yes sir. Mr. Dienstag had it in his office.

Q. And do you know the signature of Sol Zemansky?

A. Oh, yes.

Q. Is that his signature?

A. Absolutely. (Tr. 451.)

EDWARD DIENSTAG

DIRECT EXAMINATION

Q. Did you have the contract drawn up in final form?

A. The contract at that time had been drawn up in final form except for the numbers of each pledge ticket.

Q. Now, when the contract was completed, what, if anything, did you do with it? (Tr. 520.)

A. The contract was completed I believe on the afternoon of the next day, but I did nothing about it because I was in a trial in Long Beach at that time. The following day, the 22nd, I went over to the Provident Loan Association, to the office of Mr. Kleinman and told him to sign the contract.

Q. How many contracts did he sign?

A. Two.

Q. Duplicate copies?

A. Yes. He signed them and I said, "Let's get hold of Sol and have him sign them." Sam said, "I don't know where he is, I haven't seen him this morning." I looked out of the door and saw Mr. Abe Zemansky. I said, "Where is Sol?" and he said "Sol has been called up North." I said "Well, gee, that's a fine thing for him to do; here I have been breaking my neck to get this thing ready for him and he is gone." Abe said "Well, he was called in a great hurry, he just had to go up there." I said, "Well, then, Abe, I have got to get back to San Francisco and I will see him there when I get up there." I left Los Angeles that evening.

Q. When you left, what, if anything, was done with the contracts?

A. I took them with me.

Q. Now, did you contact Mr. Zemansky in San Francisco?

A. The morning after I got to San Francisco, I called the St. Francis Hotel and asked whether Mr. Zemansky was registered there, I asked whether Mr. Zemansky was there, and they said (Tr. 521) he wasn't there but he had registered. I said, "Well, then, will you be so kind as to have him phone me as soon as he comes in." I received a telephone call from Mr. Zemansky on the following morning, which would be February 24th. I said, "Sol, I have brought the contracts here with me because I was told you were here and I had to be here myself. I want you to come over to the office and sign the contract and the notes." Sol said, "I will come over, Ed, but I have got to go over to Oakland, to El Cerritos, this morning; what time in the afternoon will be all right?" I said, "Any time around two or three." Sol said, "I will be there." Then that afternoon, sometime between two and three o'clock, Mr. Zemansky came in the office and I gave him the contracts to sign. He said, "Are these the same ones I read," and I said yes, and he looked through them and signed both contracts. I then gave him the series of twenty notes of \$5,000 each to sign, which he did. (Tr. 522.)

MR. WOLVER: Q. What was done with the copies of the contracts at that time, Mr. Dienstag?

A. I retained one and gave the other, which had (Tr. 522) Mr. Kleinman's signature on it, to Mr. Zemansky. (Tr. 523.)

STIPULATIONS

MR. DIENSTAG: If your Honor please, by stipulation the following statement is made, that the total amount for which the articles were pledged, which were selected as security for the February 24th contract, was \$107,140, so that is the security, the principal amount, for which the articles were pledged. This did not include any interest due on the pledges.

MR. LAUGHARN: In other words, that is the total of the pledges without interest, as set forth in the Exhibit A attached to the contract of February 24th.

MR. DIENSTAG: That is correct. (Tr. 322.)

MR. CHOTINER: It is stipulated by and between counsel that the records of the Hotel St. Francis of San Francisco show that a Sol Zemansky registered there on February 22, 1939. So stipulated, gentlemen?

MR. DIENSTAG: I see no objection.

THE REFEREE: All right. He registered February 22, 1939. Proceed. (Tr. 391.)

MR. LAUGHARN: As a starting point, I think from the Trustee's position we concede the gross amount of the claim; in other words, before the hearings we had a question with respect to the \$1100 amount, with respect to the \$1200 amount, the \$1,000 and the \$3,750, and the I.O.U.'s held by Mr. Kleinman. Now, we feel that our position with respect to the \$1200 item has been cleared up and the (Tr. 512) claimant has shown that item. We feel the claimant has shown

the item of May 13th of \$1,000. We have no further evidence in connection with the \$3,750 of June 2nd, other than what has been introduced, and we have no further evidence to show that there is no consideration supporting it. I think the testimony is that it was for I.O.U.'s——

MR. WOLVER: And cash. (Tr. 513.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. When the pledges were set aside as security for Mr. Kleinman, were the boxes marked in any manner?

A. I believe there was a "K" in front of the boxes on the cardboard. (Tr. 231.)

Q. BY MR. CHOTINER: At the time the security was first given to Mr. Kleinman, were the boxes which contained these pledges marked at that time with any insignia?

A. I don't know.

Q. Do you know of your own knowledge whether they were marked at any time after that?

A. The Kleinman pledges, I believe, always had a "K" on them. (Tr. 232.)

Q. Do you know when that "K" was put on there in relation to the time they were set aside for Mr. Kleinman?

A. I think at the time we set them aside.

Q. Were you present on any of those occasions?

A. No, that transaction was handled by Mr. Kravitz.

Q. At the time when security would be given to Mr. Kleinman, were the pledges transferred from one box to another box?

A. Yes. (Tr. 233.)

Q. Do you recall ever observing the manner in which the pawns were segregated? (Tr. 249.)

A. The loans were transferred from one drawer into another drawer and they were marked with a "K" on the face of the drawer. (Tr. 250.)

LEO KRAVITZ

DIRECT EXAMINATION

Q. Now, will you explain to the Court the procedure that you followed in setting aside the security for Mr. Kleinman, just exactly how you handled the jewelry and the boxes and what was done on that occasion?

A. I went in the vault and got the largest loans. We got about five or six drawers of loans, which amounted to \$100,000, I think. (Tr. 286.)

LEO KRAVITZ

CROSS-EXAMINATION

Q. And when we had selected the amount of pledges upon which the loans granted exceeded \$100,000, that was the point at which we stopped selecting pledges?

A. Yes sir. (Tr. 309.)

Q. Now, there was, was there not, a cardboard, a small white cardboard, placed in the receptacle in the front of those boxes?

A. Yes sir.

Q. Marking the number of the pledge at one end of the box and a number at the other end of the box?

A. Yes sir.

Q. Then underneath those numbers, or above the numbers, the initial "K"?

A. Yes sir.

Q. And the first box was marked "K-1"?

A. Yes sir.

Q. The second box "K-2"?

A. I don't know anything about the 1 or 2, but I know there was a "K." (Tr. 309.)

SAM KLEINMAN

DIRECT EXAMINATION

MR. WOLVER: Q. Do you recall a conversation being had in your presence between Mr. Sol Zemansky and Mr. Kravitz about picking out pledges that evening?

A. Well, after Sol Zemansky was satisfied with the contract, we left my office and went into Joe Zemansky's office, Mr. Zemansky and Mr. Dienstag, and he called out, he said, "Mr. Kravitz"—he called him Leo; he said "Leo, I want you to go and pick out

\$100,000 worth of pledges to be placed in Mr. Kleinman's loan." (Tr. 448.)

Q. Did you ever go into the vault after March 1st?

A. No sir.

Q. Did you see where they were keeping the pledges that came in after March 1st

A. They kept them in a lot of shoe boxes.

Q. Did you see any marking on those boxes?

A. They had a lot of shoe boxes and the pledges were in there, and then on the top of the shoe box was a piece of paper where they used to describe on the paper with a letter "K."

Q. Did you ever discuss that with any person, why they were kept in shoe boxes?

A. No, I knew it was kept for me.

Q. Did anyone tell you that?

A. Well, I knew it, Kravitz always made the remark to me.

Q. What did Mr. Kravitz say? (Tr. 456.)

A. Mr. Kravitz says, "When are you going to book that stuff for yourself; you know that belongs to you." (Tr. 454.)

EDWARD DIENSTAG

DIRECT EXAMINATION

Q. Do you recall when the pledges were actually taken, Mr. Dienstag, the date?

A. Yes, that was on February 20th. (Tr. 518.)

A. On that evening we returned to the Provident Loan Association. Mr. Kravitz opened the vault, which had been closed apparently, and brought out of the vault two steel boxes containing little envelopes which had on them a serial number and a certain amount of money varying from \$50 to \$300 on each particular envelope. These envelopes were standing on edge, supporting each (Tr. 518) of the other envelopes in front and back, with a number on the top of the envelope. Leo brought those in to an office occupied during the day time by Miss Brown, secretary for Mr. Joseph Zemansky; he had an office there, and in which office there was an adding machine. We took turns—by “we” I mean myself, Leo Kravitz and Sego—in reading the numbers of the pledges, on the pledge bags, and the amounts, and one or the other of us would then run the amount off; as the numbers were read, the amounts were read on the adding machine at the same time and I personally also would write down those numbers on a large yellow work-sheet. As we finished a box in that fashion, we would total up the amount of the pledges in that box on the adding machine. Mr. Kravitz kept bringing out more boxes until the last box was handled, and there were about \$107,000 worth of pledges selected. (Tr. 519.) . . . After we had reached that point of \$107,000, we stopped selecting and segregating the pledges, and Mr. Leo Kravitz, under my direction, marked a “K” beside a serial number appearing on the face of each of those steel boxes. They were marked “K-1” “K-2,”

“K-3” and so forth, on each one of the boxes, and I am under the (Tr. 519) impression that there were at that time about eight or nine such boxes. There was then cleared out of the vault safe a line of steel drawers on the right side, the steel drawers facing the back of the safe from the door. In the place so cleared, these boxes containing the pledges so segregated and listed were put one below the other so that they were in consecutive order in one row. I then took the yellow sheets containing the numbers of the pledges and the amount appearing on the envelopes. (Tr. 520.)

ABE ZEMANSKY

CROSS-EXAMINATION

Q. Where were the tickets taken from; you took the pawn-tickets themselves, didn't you, out of the books? (Tr. 385.)

A. We made a record of the pledges that Mr. Kravitz picked, and then I took the stubs out of the regular books and put them in the book we kept for Mr. Kleinman. (Tr. 386.)

LEO KRAVITZ

DIRECT EXAMINATION

Q. And then when more security would be set aside for Mr. Kleinman, every few days, you would pull those stubs from the book and give them to Mr. Kleinman?

A. That is correct. (Tr. 292.)

Q. Mr. Kravitz, there were two sets of stubs, is that correct?

A. Yes sir.

Q. One set—if counsel will permit me to ask a few leading questions—what was done with the one set of stubs; where did you keep them?

A. One set of stubs Mr. Kleinman would get. (Tr. 299.)

Q. When the stubs would be pulled out of that book *and given to Mr. Kleinman*, where did you keep the Kleinman stubs?

A. In a little compartment. (Tr. 300.)

Q. Were the Kleinman book stubs kept together with the Provident book of stubs?

A. No.

Q. Where were they kept, in the same place?

A. The same place, yes sir.

Q. But in separate books, is that the situation?

A. Yes sir. (Tr. 300.)

Q. Did you ever use any other form of ticket in reference to the Kleinman transaction other than Trustee's Exhibit 8?

A. Yes sir.

Q. What was the difference between that form and Trustee's Exhibit 8? (Tr. 301.)

A. It didn't have a duplicate. (Tr. 302.)

Q. When the pledges were set aside for Mr. Kleinman, and you were not using the duplicate stubs, what did you do with the stub that was contained in the book?

A. You mean the original stub?

Q. Yes.

A. They were all put together.

Q. Were they kept in a separate book for Mr. Kleinman?

A. Yes sir.

A. And at the time the loan was first made, the stubs were all kept together, is that correct?

A. Yes sir. (Tr. 302.)

LEO KRAVITZ

CROSS-EXAMINATION

Q. In carrying out these duties, you were following the instructions of your employer, Mr. Sol Zemansky, were you not?

A. Yes sir.

Q. Now, Mr. Kravitz, do you know who took the pledge tickets, representing these pledges, out of the ordinary pledge boxes of the concern?

A. Abe Zemansky.

Q. Yes, and he started to do that the next morning, did he not, after the pledges had been selected?

A. I think so, yes.

Q. And his duty had been completed in three or four days?

A. Yes sir.

Q. And after these pledge tickets were taken out of the general pledge boxes of the company, they were put into separate boxes, weren't they? (Tr. 310.)

A. Yes sir.

Q. And they were all bound together in separate loose leaf books?

A. Yes sir.

Q. And across the edge of all of these books was put the initial "K"?

A. Yes sir.

Q. So that the "K" ran across the edge of the entire group of pledges, which formed a solid background?

A. Yes sir.

Q. And all of the pledges so selected, whether at that time or at future times, were kept in separate books?

A. Yes sir.

Q. Marked "K"?

A. Yes sir.

Q. And they remained there at all times?

A. Yes sir.

Q. Until the day a payment was made?

A. Yes sir. (Tr. 311.)

Q. So after you had selected new pledges to replace pledges which you picked out in these two transactions, the Simon and the Gans transactions, you found the tickets for those pledges which you had selected to be put in the Kleinman box in the Kleinman books?

A. Yes sir.

Q. That is where you compared the signatures?

A. Yes sir.

Q. And that is the way you did it until the time that the place was closed?

A. Yes sir. (Tr. 324.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Now, do you recall when—you are acquainted with the pledge tickets, aren't you, the stubs?

A. Yes sir.

Q. Do you recall whether or not Abe Zemansky picked out the stubs corresponding to the pledge tickets?

A. Yes sir.

Q. Do you remember when he picked those out. Mr. Kleinman?

A. Well, he picked them out, I think he picked them out about the second day; he started to pick them out right away, you know, but he could not finish them; it took him quite a while to finish them, about the next day.

Q. Do you remember when they were picked out what he did with those pledge tickets?

A. He put them in a separate book like the other pledge books are.

Q. Was any mark put on those books?

A. Yes, he had them in a pledge book like the other pledge books are, and he took a pencil and copied a mark on the pledge tickets, like this is the pledge ticket, with a letter capital K. (Tr. 449.)

Q. That was on the back of the book?

A. Not on the back, on the pledge book, I mean like this.

Q. On the edges of the pledge book?

A. Yes.

Q. Did he ever give those books to you?

A. When he had them picked out?

Q. Yes.

A. I understood the contract had to be signed and I had to sign for having received the pledge tickets so I went to Mr. Horn when they were all ready and Mr. Horn came out with those two contracts.

Q. Were they white pieces of paper, Mr. Kleinman?

A. Yes, white pieces.

Q. What was done with them?

A. Well, Mr. Horn says, "Have you got the pledge books?" I said, "Yes, they are right here." We went in Abe Zemansky's office and Abe Zemansky was there, and he asked me to sign the contract, that I received the pledge tickets. After I signed for the pledge tickets, he asked Abe Zemansky to sign the other one.

Q. Where were the pledge books at the time these were signed?

A. In Abe Zemansky's office.

Q. They were right there on the desk?

A. Yes.

Q. And you signed it first and then he signed it?

A. Then Abe Zemansky signed. (Tr. 450.)

EDWARD DIENSTAG

DIRECT EXAMINATION

A. A copy of those sheets was made, that is, I mean in writing, and was given to Mr. Abe Zemansky by me with directions to take out of the regular books, bound books, of pawn-tickets, the pawn-tickets corresponding to those numbers, placing them in order and to put them in separate books. The other copy, that is, the original copy made that night, I took to my office in Los Angeles and directed the secretary to type them on legal-sized sheets and to list them as Exhibit A. (Tr. 520.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. Do you recall asking Mr. Kleinman if you could use the money that had been collected on the contract of the 24th?

A. I don't recall. (Tr. 245.)

SAM KLEINMAN

DIRECT EXAMINATION

And Sol Zemansky said, "You know, Sam, while you were away those few days we collected close to \$4,000 on your pledges, while you were away which I have the ticket for, the slips for every day, every time merchandise is delivered to the customers."

And he said, "How about letting us re-loan that money from you." I promised them I would go and stay with them a few months more to help them out. He said "You promised you will stay with us a little longer; we will be busy and you know we would like to have you with us a little longer since you know about doing that." I looked at Eddie again and Mr. Dienstag said "Well, I will tell you, Mr. Zemansky, if you want to take Mr. Kleinman's pledges that come in, the money that comes in from his pledges, I want it understood that all pledges coming in in this office belong to Mr. Kleinman and the money he loans for the pledges." So he said "How about picking new pledges for that \$4,000 and putting it in a contract." I said "That will be all right." So that new contract was changed for around \$4,000. (Tr. 453.)

EDWARD DIENSTAG

DIRECT EXAMINATION

MR. WOLVER: Q. Did you see Mr. Kleinman after that?

A. Mr. Kleinman arrived in San Francisco the following morning, February 25th. (Tr. 523.)

Sol said, "Well Sam, we have collected some money for you already; do you have to have that money or could we borrow it." He said, "We can use it to loan out for new pledges, business is pretty good." Sam

turned to me and said, "Well, how about that, Ed?" I said, "Well, don't ask me, it's your money, whatever you want to do with it." I said, "If you loan them that money, we will just have to have security for it." (Tr. 533.) Sam then said, "All right, Sol, you can use the money that you have taken in." I said, "In that event, I will include that in this new contract that we are drawing up." (Tr. 534.)

STIPULATION

MR. WOLVER: Mr. Laugharn, I understand the books of Zemansky Brothers indicate, and I ask for a stipulation, that Mr. Kleinman received no salary between the last week in December and the first week in March, 1939. I believe Mr. Young and Mr. Yates can verify that for you gentlemen.

MR. CHOTINER: You want us to stipulate that he received no salary during that period? (Tr. 461.)

MR. LAUGHARN: Here is the effect of what they are stipulating. They have inspected the books and the last check in 1938 was December 24, 1938, \$74.25, and the first check in 1939 was March 11, 1939, \$49. That's what the record shows.

MR. WOLVER: May we have that so stipulated?

MR. LAUGHARN: So stipulated on our part. (Tr. 462.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. What was the basis for determining, if there ever was a basis for determining it, when a new contract would be made out?

A. I think Mr. Kleinman would say make a new contract and he had his dealings with my brother on that. (Tr. 163.)

Q. What were the circumstances, if you know them or can recall them, under which these contracts were executed so far as the setting aside of security for Mr. Kleinman was concerned?

A. Well, I believe the mechanics of it was he was given new loans and a new deal was made, a new note executed for that amount of money. (Tr. 222.)

Q. When the new notes were executed, new loans were set aside as security for Mr. Kleinman, is that correct?

A. I understand that was the way it was always done.

Q. Were those new loans set aside for Mr. Kleinman at the time when the old loan was withdrawn by virtue of redemption by customers?

A. I believe so.

Q. At the same time?

A. Yes sir; will you ask that question again?

MR. CHOTINER: Read the question.

(Question read.)

Q. BY MR. CHOTINER: Do you understand the question?

A. Yes, but the answer to it would be no. They were not set aside at the same time, because those were the accumulation.

Q. In other words, whenever these new contracts were executed, they were the result of an accumulation of loans that had been withdrawn from the Kleinman security on account of redemption?

A. That is correct. (Tr. 223.)

Q. How would you arrive at what periods you would execute these new contracts?

A. I don't believe there was any definite period ever worked out.

Q. Who broached the subject whenever these contracts would be executed?

A. Mr. Kleinman.

Q. Mr. Zemansky, directing your attention now to the time when you had a conversation with Mr. Kleinman, at which Mr. Dienstag was present, was there any conversation regarding the subject matter of how the new contracts were to be handled?

A. As I recall, Mr. Dienstag, I believe, said at that time that as new contracts were to be made, it would sort of work out on a revolving theory; in other words, new loans followed old loans, making a new contract each time it built up. That was about the substance of it. (Tr. 224.)

Q. Was anything said regarding the subject matter of the execution of new notes?

A. Yes, they asked to have new ones.

Q. Who said that?

A. I believe Mr. Dienstag, in explaining the mechanics of the thing how it should be worked out.

Q. Tell the Court as best you can recall at this time, recognizing that you cannot be expected to (Tr. 224) remember each word that each person said, but tell us as you can best recall it, what Mr. Dienstag said as to how the mechanics of having these new notes would be handled.

A. Well, as loans were redeemed, the ones Mr. Kleinman was holding would be totaled up and a sum equivalent to that would be replaced and a new note given.

Q. Was anything said about any checks being given in connection with these new notes?

A. Yes, I believe he said if we paid for the old loans, that were redeemed, new money would be given in lieu of the new transaction. (Tr. 225.)

SOL ZEMANSKY

CROSS-EXAMINATION

Q. Do you recall a conversation at which Mr. Dienstag set forth the basis under which Mr. Klein- (Tr. 245) man's money could be used, or any fresh money that he brought forth could be used?

A. I can't recall it.

Q. Was anything said about a revolving security that night?

A. Something was mentioned on that line, about new contracts. (Tr. 246.)

Q. BY MR. WOLVER: Do you recall Mr. Dienstag stating that evening that all security that would be redeemed would have to be replaced by other security?

A. I don't recall that.

Q. Do you recall stating that all redemption money would have to be used for the acquiring of new pawns?

A. Yes, that the redemption money could be used for new pawns. (Tr. 246.)

SOL ZEMANSKY

RE-DIRECT EXAMINATION

Q. Now, directing your attention to the testimony on cross-examination about a revolving fund for money that would be advanced or used, in connection with the Kleinman transaction, what do you mean by that?

A. What I meant by that was the money that would accumulate from redemptions was going to be used to take in more loans, new loans. (Tr. 266.)

SOL ZEMANSKY

RE-CROSS EXAMINATION

BY MR. WOLVER:

Q. When you referred to a revolving security, didn't you mean that the money that would come in

from redeemed accounts would be used to acquire pledges?

A. Yes, that was my understanding of it.

Q. And in that manner the security would be immediately replaced?

A. Yes, for example, we would always give new security. (Tr. 268.)

DAVE ZEMANSKY

DIRECT EXAMINATION

MR. DIENSTAG: Q. You have said that the money which was received from Kleinman's redemptions or, you used the term, you got some money *out them*; by that, did you mean you were able to re-loan that out on new pledges?

A. Yes.

Q. So that you used the money to loan out on new pledges?

A. Yes sir. (Tr. 507.)

ABE ZEMANSKY

DIRECT EXAMINATION

MR. CHOTINER: Q. Mr. Zemansky, whenever you made a redemption of a pledge that had been set aside for Mr. Kleinman, how long would it be in the custom of the business before other pledges were used to replace the ones that had been taken away?

A. Sometimes two or three days, sometimes a week. We always ran it to about three or four thou-

sand dollars, fifteen hundred dollars, all over a thousand dollars. (Tr. 364.)

ABE ZEMANSKY

CROSS-EXAMINATION

A. Whenever we got a certain amount of pledges that were redeemed, we replaced others for them. (Tr. 377.)

LEO KRAVITZ

DIRECT EXAMINATION

Q. What did you use the money for after you put it in the cash box?

A. Loaned it out.

Q. At that time, did you take another pledge and put it in place of the one that you had taken from Mr. Kleinman's security?

A. The following day or two, or three days later, I would.

Q. But at that same time, did you ever take another pledge and put it in place of the one that you had taken from Mr. Kleinman's security?

A. No sir. (Tr. 291.)

Q. When you put the money in the cash drawer, on one of those redemptions, did you put it in any other section of the cash drawer than the place where you would put any of the money?

A. In the same drawer.

Q. Did Mr. Kleinman ever effect any of those redemptions?

A. What do you mean by that question?

Q. I will withdraw the question. Mr. Kravitz, did Mr. Kleinman ever make a redemption of a pledge that had been set aside to him for security?

A. Yes sir.

Q. What did he do with the money when he received it from a customer?

A. Put it in the drawer.

Q. In the same manner that you had done?

A. Yes sir. (Tr. 291.)

Q. And was that money used over again for the purpose of making new loans to customers? (Tr. 291.)

A. Yes sir. (Tr. 292.)

LEO KRAVITZ

CROSS-EXAMINATION

Q. *When you got the money, or when you got the money when one of these pledges was redeemed, you testified you put that in the cash drawer?*

A. *Yes sir.*

Q. *Is that correct?*

A. *Yes sir.*

Q. *And then you would use that money in taking in other pledges, that is, you would loan it to customers, wouldn't you?*

A. *Yes sir.*

Q. You did the same thing with all the money that came in, didn't you?

A. Yes sir.

Q. *In other words, if money came in from a pledge that belonged to the company, and which had not been assigned to anyone, you would use that money for new pledges, any money that came in would be used for new pledges?*

A. *Not all the time, no.*

Q. *Well, what would you use the money for?*

A. *The remaining money I used to have to lay aside.* (Tr. 315.)

Q. Now, at frequent intervals every other day or every three days, you were delegated to the duty, weren't you, of selecting additional pledges to replace the pledges which had been redeemed out of the Kleinman boxes?

A. Yes sir.

Q. And that was a continuous duty, was it?

A. Yes sir.

Q. Now, who took the pledge tickets out of the new tickets which had come in, and placed them in the Kleinman book?

A. Abe Zemansky.

Q. So that was his duty, was it not?

A. Yes sir.

Q. And did you ever see him do it?

A. Yes sir.

Q. And was that just frequently when he picked out the pledges themselves?

A. Just about.

Q. So as you picked out the pledges, Mr. Abe Zemansky would pick out the tickets? (Tr. 316.)

A. Yes sir. (Tr. 317.)

LEO KRAVITZ

RE-DIRECT EXAMINATION

Q. Directing your attention to the first time that you set aside pledges for Mr. Kleinman, and then you would go ahead and make redemptions for customers, how often would it be that you would accumulate other pledges and put them over into the Kleinman security account?

A. Well, *I used to have them ready for Mr. Kleinman*, if I got a bunch of them set aside, they would amount to three or four thousand dollars; I would give them to Mr. Abe Zemansky and Abe Zemansky brought them to me and we would give them to Sam, three or four thousand dollars worth of pledges.

Q. That would happen to be every two, three or four days?

A. A little longer than that sometimes. (Tr. 338.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Mr. Kleinman, after the security contract was signed by you and the Zemansky Brothers, and redemptions would be made of that security, when cus-

tomers would come in to redeem some of the pledges every few days or so, a new contract would be made out, isn't that correct?

A. Yes sir.

Q. And whenever a new contract would be made (Tr. 433) out, a new promissory note would also be made out, isn't that right?

A. Yes sir. (Tr. 434.)

Q. Was there anything said at that time, Mr. (Tr. 453) Kleinman, in regard to what use the money that came in on your redemptions could be put?

A. To loan out on new pledges, and I understand Mr. Dienstag gave him to understand at that time, and he told him right in front of me, he says, "Sol, I want every dime and every dollar that belongs to Mr. Kleinman loaned out, but I want every pledge that comes in to belong to Mr. Kleinman."

Q. Do you recall Mr. Dave Zemansky being present at all?

A. Yes, that night, on that night, when they signed Mr. Simon's contract; Sol Zemansky was there, Abe Zemansky and Dave Zemansky all three of them, because they had to sign that contract. Simon didn't want to leave the place until they signed the contract, wanted to take the contract along with them. So Dave Zemansky says, "Sam, as you are willing to let us re-loan your money, how about giving (Tr. 529) us some fresh money." He said that to me and to Mr. Dienstag, he talked with me and Mr. Dienstag talked to me, Mr. Dienstag said "It is not my money, whatever Mr.

Kleinman agrees, if you do it like I told you to, with his money, I think you can do it.”

Q. Did Mr. Sol Zemansky or Dave Zemansky say they would?

A. Oh yes, they were all there together, all three of them. (Tr. 454.)

EDWARD DIENSTAG

DIRECT EXAMINATION

Dave Zemansky came in and he said, “Well, Sam, if you have got any more money, we could use some fresh money, we could use quite a bit of money.” He said, “We would like to borrow some” and Sam again turned to me and said, “Well, how about that, Ed?” I said, “I can’t advise you about loaning the money; it is your money, you do with it as you want to, but if you are going to allow them to borrow money that they have been taking in and you are going to give them any new money, there is only one way that I see that the transaction can be handled.” I said, “Any money that you give them must be loaned out on new pledges,” and Sol said, “That is what we want it for; of course, it will be loaned out on new pledges.” I said, “In addition to that, all of the pledges that come in the Provident will have to come to secure you”; so at that Dave said, “These pledges coming in, they are going to be your security.” I said, “If (Tr. 533) you are going to give them money, you get all of the pledges coming to you.”

MR. CHOTINER: Was that in the presence of Sol Zemansky?

A. And Dave Zemansky. Sol said, "Well, whichever way is the proper way to handle it, that will be all right." (Tr. 534.)

[TITLE OF DISTRICT COURT AND CAUSE]

**REPORTER'S TRANSCRIPT OF EXCERPTS FROM
PROCEEDINGS ON HEARING ARGUMENT ON
CERTIFICATE ON PETITION OF SAM KLEIN-
MAN FOR REVIEW OF REFEREE'S ORDER
OF JANUARY 17, 1941. (Tr. 547.)**

THE COURT: Isn't it also true that in addition to such endorsements there was an increase in the indebtedness owing from the bankrupts to Kleinman in the amount of \$8,350?

MR. PACHT: That is correct.

MR. CHOTINER: That is correct.

MR. PACHT: Those loans were made between May 2, 1939, and July 10, 1939. (Tr. 554.)

RALPH J. YATES

DIRECT EXAMINATION (Tr. 538)

Q. Have you computed at my request the amount of redemptions, pledges secured to Mr. Kleinman by pledge agreements that were redeemed over the period of February 24th until the filing of the petition in this matter?

A. I have.

Q. What is the amount of that? (Tr. 540.)

A. The amount of \$44,915.

Q. Mr. Yates, do you know the amount of money that was loaned out by the Zemansky Brothers or the Provident Loan Association between the 24th day of February, 1939, and the date of the filing of the petition in this case?

A. I do.

Q. How much is that?

A. \$55,120.37. (Tr. 541.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. Did you take that money, in a case of a pledge that had been given to Mr. Kleinman as security, and keep it separate from the rest of the funds of the Provident Loan Association?

A. No, it went in the usual cash drawer.

Q. What was done with the money after it went into the regular cash drawer?

A. It was used the same as all other cash.

Q. I take it that new loans were made with it, with that same money, is that correct? (Tr. 86.)

A. That is correct.

Q. Was that procedure ever changed at any time after Mr. Kleinman had been given security insofar as those pledges were concerned?

A. So far as I know, I don't think that procedure was ever changed. (Tr. 108.)

Q. Mr. Zemansky, whenever a new contract would be made out and those pledges had been given as security to Mr. Kleinman, and a customer would want to come in and redeem the pledge, would the same procedure be followed as was followed out on prior occasions?

A. The same procedure.

Q. And what was done with the money?

A. It went in the cash drawer.

Q. For what purpose was the money used?

A. In the general line of business.

Q. Was any of that money on the new contracts ever used or set aside in a separate account?

A. I don't recall anything like that.

Q. Was anything ever said to Mr. Kleinman as to where that money was going?

A. Not by me. (Tr. 163.)

LEO KRAVITZ

DIRECT EXAMINATION

BY MR. CHOTINER:

Q. What did you do, Mr. Kravitz, when a customer would come in and want to make a redemption of a pledge and that was one of the pledges that had been set aside for Mr. Kleinman?

A. I used to go in the vault and get it and give it to the customer.

Q. What did you do with the money that the customer gave you?

A. I used to put it in the cash box. (Tr. 290.)

ROBERT SEGO

DIRECT EXAMINATION (Tr. 339)

Q. At that time, whenever you would make a redemption of a pledge that had been set aside for Mr. Kleinman, what did you do with the money?

A. Put it in the cash drawer.

Q. And what did you do with the money after it went in the cash drawer?

A. Used it for loans again, when they came in. (Tr. 340.)

Q. Did you ever see Mr. Kleinman— Withdraw that. Did Mr. Kleinman ever make redemptions of pledges that had been set aside for him?

A. He did.

Q. What did he do with that money? (Tr. 340.)

A. He put it in the cash drawer, too.

Q. Was that money used again for the purpose of making new loans?

A. That is right. (Tr. 341.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. Was anything said as to what loans were going to be used?

A. Yes, there was.

Q. What was said?

A. Mr. Kleinman said we could use some of his loans in order to expedite the matter and get the Sheriff out of the place. (Tr. 171.)

Q. BY MR. CHOTINER: Does that refresh your memory as to the circumstances under which the March 2, 1939, contract was executed?

A. I am not certain. I think some loans were taken from Mr. Kleinman's box and put in the Simons deal.

Q. And that was done with Mr. Kleinman's consent, isn't that true?

A. Yes.

Q. As a matter of fact, Mr. Kleinman offered to do so, isn't that true?

A. Yes. (Tr. 222.)

LEO KRAVITZ

CROSS-EXAMINATION

Q. Now, Mr. Kravitz, you have been questioned about the Simon transaction, so you know what I am talking about when I say Simon transaction? (Tr. 319.)

A. Yes sir.

Q. You were instructed at one time subsequent to the selection of those pledges, were you not, to take certain of the pledges out of the Kleinman drawers and list the numbers?

A. Yes sir.

Q. At the same time you were given instructions, were you not, to select other pledges for Mr. Kleinman?

A. Yes sir.

Q. So that as soon as you selected the pledges and got the numbers out of a particular drawer in the Kleinman box, you started selecting other pledges to replace those?

A. Yes sir.

Q. When you had finished selecting those new pledges, you placed those, having obtained the numbers, you placed (Tr. 333) those in the Kleinman drawer, did you not?

A. Yes sir. (Tr. 320.)

Q. You replaced them with the exact amount of other pledges and tickets?

A. Yes sir.

Q. And in that case, as in the previous case, Mr. Abe Zemansky pulled those tickets out of the regular books, didn't he?

A. Yes sir.

Q. And those were kept separate?

A. Yes sir.

Q. Handled just as the other transaction had been handled?

A. Yes sir. (Tr. 321.)

Q. BY MR. DIENSTAG: You have heard of Mr. Gans?

A. Oh, yes, Mr. Gans, yes.

Q. Robert Gans?

A. Yes sir.

Q. Did you take out of the Kleinman pledges, pledges for the Gans transaction?

A. I think I did.

Q. Yes. And you were instructed to do that by your employer, of course?

A. Yes sir.

Q. Yes. At that time, you also selected other pledges, did you not, to replace in Mr. Kleinman's box, the ones which you had taken out for the Gans transaction?

A. Yes sir.

Q. And those were all selected, that is, the replacement pledges were selected about that time, as you remember?

A. Yes sir.

Q. And those tickets were taken out of the pledge books by whom, Mr. Kravitz?

A. Mr. Abe Zemansky.

Q. So all through this period, Mr. Kravitz, you were the one who actually handled the pledges themselves, that is, the physical pledges so involved, you were the one who carried forth the transaction with regard to taking them out of the boxes or replacing them with others?

A. Yes sir.

Q. And Mr. Abe Zemansky, one of your employers, was the one who took these pledge tickets out of the books, and (Tr. 323) did he put them in the other Kleinman books himself or did you put them in?

A. No, he put them in.

Q. He put them in there. And that is where you found them, didn't you?

A. Yes sir. (Tr. 324.)

LEO KRAVITZ

RE-DIRECT EXAMINATION

Q. Now, at the time you set aside security for the Simon account,— Withdraw that. I will now direct your attention to the time when you set aside the security for the Simon account, that was the occasion when you took some of the Kleinman pledges, and used them to make up the Simon security; is that correct?

A. Yes sir.

Q. How long after you did that was it that you set aside additional pledges for the Kleinman account to make up the pledges that had been taken from him?

A. As soon as I finished the Simon transaction.

Q. How long after was that?

A. It might have been that same day. (Tr. 332.)

Q. How long after that was it then that you put back or, rather, put the security on Kleinman's side in the vault after you finished the Simon matter?

A. That same day. (Tr. 332.)

Q. Just as soon as you finished Simon, did you start immediately then to set aside some pledges for Kleinman?

A. I am positive it was.

Q. Then why did you take some from Kleinman's pledges to give to Simon in the first instance?

A. Well, for the Simon account, we gave them old pledges, which would not be redeemed so fast; the money would not come in so fast with the Simon account. They were old pledges.

Q. In other words, you took old pledges from the Kleinman security to give to Mr. Simon; is that correct?

A. Yes sir. (Tr. 333.)

Q. (BY MR. CHOTINER): Directing your attention to the time when the Gans security was set aside, how long after that was it that you replaced security that had been taken from the Kleinman drawers?

A. As soon as we finished up the transaction. (Tr. 334.)

A. The only thing I know, as soon as I finished Mr. Gans' transaction, I started on Mr. Kleinman's transaction. (Tr. 334.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. Do you recall a conversation had between him and Sol Zemansky concerning this contract that Mr. Ross was preparing for the Simons?

A. Yes sir, he said, "Well, Mr. Zemansky, the contract is all made up; all you have to do is just give the pledge numbers and Judge Pacht's office will put them in the contract, and I am leaving tonight." That

is, I believe Mr. Dienstag said he wanted to leave about the 8:00 o'clock train, so Mr. Zemansky says, "Eddie, can't you do me a favor and stay right here until I clean up the whole contract" he said, "Sol, I would like to do it for you, but on account of my interests I have got to be in San Francisco, I have got to be there." He says, "How about staying and fixing it up with me and take the airplane, to go back home." Eddie didn't like it because he never went in an airplane, so it looked funny to me and when he said that I said to him myself "Eddie, you never tried it, try it once." Then he went to Mr. Leo Kravitz to pick out the pledges and Kravitz said "I can't do it so quick; it is late now for dinner," like that, so Sol says to me "Sam, to save a lot of time, to save a lot of time can't you do this for me; can't you let me pick out a certain amount of pledges from your pledges and make out the numbers and give them to Judge Pacht, and then we will pick out others for you (Tr. 452) right away, which we will have a lot more time to do, and Mr. Dienstag will be there, he will be able to go home." I turned around and I looked at Mr. Dienstag and I said, "Eddie, what do you think about it"; he said "Well, I don't see any harm in that if he gives you other pledges for it." I agreed to it. (Tr. 453.)

Q. Did you have the other pledges picked out, or did Mr. Kravitz pick out the pledges the next day for you? (Tr. 454.)

A. You mean for the exchange of the Simon's?

Q. Yes.

A. I believe he started that same night, after he was through picking out my pledges, but he hadn't finished it up until the next day.

Q. Then you signed the contract on the next day?

A. Yes, I believe it was the next day, the next day or the day after; it was right away. (Tr. 455.)

Q. Do you remember when the Gans transaction was first discussed with you?

A. That was talked to me about a couple of days before.

Q. Did you have any conversation with any person?

A. Sol Zemansky came in my office.

Q. What was said?

A. He said to me, "Sam you know we owe a little money to Bob Gans." I was surprised, I never knew they owed him any money; so I said, "You owe him money, too?" So he said, "We don't owe him much, but he is a good friend of Simon, Bill Simon," and he came up and asked me if I would not do the same thing as we did with the Simons. So he said, "You see, the pledges we have right now on hand are redeemable very fast, pledges that we have coming in. I would like to exchange pledges with you and give him pledges that don't go out so fast."

Q. Which ones were the ones that would go out so fast, Mr. Kleinman, were they older pledges?

A. Older pledges, old pledges.

Q. Which ones were the ones that didn't go out so fast, new pledges?

A. New pledges, just put in.

Q. What did you say to that?

A. I said, "Well, I don't think there is anything wrong about that," and I let him do it.

Q. And you made the exchange? (Tr. 459.)

A. I made the exchange.

Q. Do you remember when your pledges were picked out again?

A. My pledges were picked out, I believe, the same day. (Tr. 460.)

EDWARD DIENSTAG

DIRECT EXAMINATION

Q. Well, will you relate the conversation, if you can tell us, when Mr. Kleinman came in?

A. Just after I had told Mr. Zemansky I had just come from Mr. Ross's office, Mr. Kleinman came over and Mr. Zemansky said to me, "When will the contract be ready?" I said, "It shouldn't take long to type it except for the pawn-ticket numbers, that is, the pledge ticket numbers." I said, "I will have to put them in." I said, "By the way, you select the pledges and get the numbers probably tomorrow afternoon." Mr. Zemansky said to me, "When are you going?" and I said, "I am leaving this evening; I have a reservation on the 6:00 o'clock train." He said, "Well, Ed, couldn't you stay over until this is all finished?" I said, "No, I can't, I must be in San Francisco tomorrow morning without fail." He said, "Can't we get

this contract out sooner?" I said, "The only way to get it out soon is to get those numbers of the pledge tickets to Mr. Ross." Mr. Zemansky then turned to Sam and he said, "Sam, why couldn't we give him a drawer of your pledges and get those numbers so this can be completed while Eddie is here"; and Sam turned to me and he said, "Well, Ed, can we do that?" I said, "Yes, as long as we replace them with other pledges." Sol said, "Well, Sam, is that all right?" Sam said, "Ed is handling this; it is up to him." I said, "That will be all right, Sol, as (Tr. 531) long as you put the loan back, replace the pledges which you take." Sol then called Mr. Leo Kravitz and told him to take a drawer of those pledges and get the numbers off a drawer of Kleinman's, and get the numbers right over to Mr. Ross, so that they could be put in the contract, and as soon as he had gotten the numbers over there to start selecting pledges to replace the pledges that were taken from the Kleinman drawer. And those numbers, I am not certain whether I took those numbers over to Mr. Ross or whether they were sent over there, but they got over there in a very short time, as soon as they were copied off the Kleinman tickets, that is, that box of pledges, and about 5:00 o'clock of that day Kravitz had finished selecting the new pledges for Kleinman and had given me the numbers, which I took over to my office here in Los Angeles and handed to Mr. Horn, I think it was, to have copies for me for the basis of a new contract. (Tr. 532.)

A. Sam had agreed to take this substitution of pledges, I said to Sol, "Of course, you know, Sol, we will have to make a record of the substitution of pledges somehow; I think the way to do would (Tr. 532) simply be to draw a new note for the amount of the pledges and a new contract, we can have that done right away. (Tr. 533.) Later on, while I was at the office in regard to this contract, I got a telephone call with regard to including another sum of money in this contract, a cash sum of money. I don't recall the exact amount, but it was \$1200 and some odd dollars. The final contract that I drew up that day, which included the substitution of the pledges, the sums which had been collected up to that time, and this new money, was \$25,920, I believe. I think that sum is right. (Tr. 534.)

SOL ZEMANSKY

DIRECT EXAMINATION

Q. Now, was a list of those redemptions ever furnished to Mr. Kleinman?

A. Yes.

Q. And who would furnish that list to him?

A. I think the bookkeeper at the Provident kept track of those, and Mr. Kleinman, together jointly.

Q. Then what would be done after the list had been given to him? (Tr. 108.)

ABE ZEMANSKY

CROSS-EXAMINATION

MR. DIENSTAG: Q. Mr. Zemansky, I call your attention to the left-hand column of the first page of Kleinman's Exhibit 5, and ask you what the sums are which are listed there?

A. These were checks given and they equal \$5,000 for each note.

Q. In other words, these are the credits on each note, Mr. Zemansky, due Zemansky Brothers on notes for which they had signed?

A. Yes sir.

Q. So you would credit yourself with the amount of pledges, is that correct, on the contract made or the payment made, and you would endorse the note a certain amount paid?

A. Mr. Kleinman would put down on the notes "Paid on account," until each note equaled the \$5,000, and then turned the notes over to Dave.

Q. Turned the notes over to your brother Dave?

A. Yes.

Q. In return, you would sign another note?

A. A new note.

Q. For the amount of the new contract?

A. The new contract, that's correct.

Q. If you will follow these dates with me, Mr. Zemansky, March 2nd, referring again to Kleinman's Exhibit number 5, you credit the sum of \$25,920?

A. Yes sir.

Q. Now, that was the amount of the Simon transaction, was it not?

A. I believe it was. (Tr. 373.)

Q. In other words, when you signed the Simon contract, that is, the Kleinman contract which had to do with the Simon deal, the Simon transaction, you signed new notes in the sum of \$25,920, and that was credited against the \$100,000 contract?

A. That is right.

Q. And following that, when you signed the contract of March 22nd you credited your account with \$2,510, and that was credited on one of the \$5,000 notes and a new note in the sum of \$2,510 was given, the contract was signed and both were delivered to Mr. Kleinman, together with a list of the pledges, thereto attached?

A. That is right.

Q. And you followed the same procedure thereafter with every transaction, isn't that so?

A. Yes sir.

Q. That was the procedure by which you credited the new contracts on the old ones; by the old contracts, I mean the first contracts, Mr. Zemansky?

A. Mr. Kleinman credited the \$5,000, then we made out new notes for the new loans that went in the box. (Tr. 374.)

Q. *Do you know why these tickets were being given to Mr. Kleinman, why they were being made out?*

A. *To show the pledges which were redeemed.* (Tr. 376.)

Q. Did you keep more than one book like this one?

A. We kept I think another book.

Q. With the same numbers?

A. The same numbers.

Q. And it was marked exactly the same way?

(Tr. 378.)

Q. One was a copy of the other so far as the numbers and the amounts were concerned, is that right?

A. That is right. (Tr. 379.)

MR. DIENSTAG: Q. Calling your attention to the last exhibit, which is one I believe that you prepared, purporting to be certain pledges which were (Tr. 381) security for a contract, did you prepare other lists like that for your contract?

A. Yes sir.

Q. Calling your attention to Exhibit number 5, I call your attention to a contract in a column on the first page of the exhibits, and marked March 22, "C," \$2,510. March 22nd I take it is the date you entered into that contract, is that correct?

A. Yes sir.

Q. And "C" is the identification of that particular contract on that date?

A. Yes sir.

Q. And the \$2,510 is the amount of the contract?

A. The amount of the contract.

Q. I call your attention to Exhibit number 7, labeled "C," where the security is listed at \$2,510. Now, this security, Mr. Zemansky, is the security for the contract of March 22nd in the sum of \$2,510, is it not?

A. That is right.

Q. And those pledges were selected two days before you entered into that contract, is that correct?

A. Yes. (Tr. 382.)

MR. DIENSTAG: Calling your attention again to Exhibit number 7, after you prepared these lists, Mr. Zemansky, what would you do with those?

A. We would put it in the blotter and give one set to Mr. Kleinman; the other set was put on the blotter and kept as a record.

Q. So that you gave one of those to Mr. Kleinman when you prepared it?

A. Yes sir. (Tr. 383.)

ABE ZEMANSKY

RE-DIRECT EXAMINATION

BY MR. CHOTINER:

Q. Directing your attention to Kleinman's Exhibit 6, being a ledger book, does that book generally cover all pledges other than the Kleinman pledges? (Tr. 386.)

A. This contains, I believe, only Kleinman pledges. (Tr. 387.)

SOL ZEMANSKY

DIRECT EXAMINATION

A. After a certain amount of money would be run up that way, I think Mr. Kleinman would give my

brother, Abe Zemansky, a check, and he used to walk down to the Union Bank and cash the check and apply it as—get the money in currency and turn it over to Mr. Kleinman, and then apply it as on the note. I think that was the mechanics of the thing. They would proceed to take new loans for the ones that had been redeemed, approximately. (Tr. 109.)

ABE ZEMANSKY

DIRECT EXAMINATION

Q. Mr. Zemansky, after the contract covering the \$100,000 in notes was signed, did you ever go to the Union Bank with Mr. Kleinman?

A. Yes sir.

Q. What was the occasion of your going to the Union Bank with Mr. Kleinman?

A. Mr. Kleinman would make out a check for the amount of the redemption, say the redemption was \$4,000, and a check was made in his daughter's name.

Q. Do you know what his daughter's name is?

A. Dienstag.

Q. Then after the check would be made out, what would you do?

A. I would go with Mr. Kleinman to the Union Bank. The first time he told the teller any time I brought any check in to cash it. Whatever the amount was the teller would give me the money. Mr. Kleinman would be in the back and take the money, just a routine like that. (Tr. 365.)

Q. After you got the money from the teller, what did you do with it?

A. Mr. Kleinman would be there and I would pass it to Mr. Kleinman.

Q. Did Mr. Kleinman go with you on every occasion that you went to the Union Bank to cash a check?

A. I think most every occasion, maybe once or twice he didn't go.

Q. How close did Mr. Kleinman stand to you (Tr. 366) at the time you would go down to the Bank and get the money?

A. After the first time it was always at the Union Bank.

Q. And then you would go over to him, is that correct?

A. And hand him the money. (Tr. 366.)

Q. Now whenever you would go down with Mr. Kleinman with those checks to the Union Bank, (Tr. 366) did that ever have anything to do, if you know, with the making out of new notes and new contracts?

A. We took the check to the Bank, we got out a new contract and a new note and we put pledges in the drawer for the amount of the loans taken out.

Q. And was that done on all the occasions that these new contracts and new notes were executed?

A. On all of these occasions. (Tr. 367.)

MR. CHOTINER: Q. What would be the basis for determining as to the amount you would make the check out for in the first place?

A. The amount of loans that was redeemed and new loans placed in the box. (Tr. 369.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. At the time the new note and the new contract would be made out, you would issue a check to Zemansky Brothers, isn't that right?

A. Yes sir.

Q. And you and Abe Zemansky would go down to the Union Bank and Abe got the check cashed?

A. Yes. The first time I did, the first couple of times.

Q. And when Mr. Zemansky cashed the check, he would give you the money, isn't that right?

A. He came back to the office and handed me the money.

Q. Did you go to the bank with him?

A. Just a couple of times.

Q. When he would cash the check the first couple of times that you went with him, he would give you the money right there in the Union Bank, wouldn't he?

A. No, he usually held it in his pocket and when we got to the office he would give it to me.

Q. Then he would give it to you?

A. Yes.

Q. Then you would deposit the money back in the account again? (Tr. 434.)

A. Sometimes I did; sometimes I left it in the drawer.

Q. And Mr. Zemansky, Abe Zemansky, told you that the teller wanted to know why the money was being deposited back in the account again? (Tr. 435.)

A. No, he never told me that.

Q. At any rate, other than the first couple of times, you said that Abe Zemansky went by himself to the Union Bank and got the checks cashed, is that right?

A. Yes sir.

Q. On all of the times that he cashed the checks, he would turn the money over to you at the office, isn't that right?

A. Yes sir.

Q. Sometimes you re-deposited the money and sometimes you would not, is that right?

A. Yes sir.

Q. When you did re-deposit it, it was in the bank account of Jeanette Dienstag, your daughter?

A. Yes sir. (Tr. 435.)

Q. The second one is the 2nd day of March, 1939, which we have discussed as the contract relating to the Simon contract. The next one is on the 22nd day of March, 1939; do you recall when that contract was made and entered into, do you recall making the contract about that time?

A. Yes, surely.

Q. Do you recall it was in the sum of \$2,150?

A. Yes.

Q. Prior to the making of that contract, did you have any conversation with any of the Zemansky boys?

A. Yes, I talked to Abe Zemansky about that.

Q. All right. About when did you talk to Abe Zemansky?

A. Just before I started to make that contract.

Q. Who was present at that time?

A. Just me and him.

Q. And what was said?

A. Well, Abe says, "We are going to have a lot of contracts here to sign, the way the goods goes out and comes in." He said, "We have to have some system about it." I said, "Do you know of any system which we can have?" He said, "I am going to have a book where I am going to stamp the pledges with the seal, and if you are going to make out any contracts like for around \$7,000 or \$8,000, why not (Tr. 457) give us a check and we will run a checking system." That sounded pretty good to me, that checking system. I said, "Abe, I don't think I got that kind of money in the bank; I will run down and find out how much I have." I came back and told him about the amount of money I can put out and he said, "Well, you don't have to have it on one contract; you make a contract today and in a couple of days later you make another one."

Q. Do you recall how much money you told him you could pay out?

A. Well, I told him the first contract was \$2500 and the pledges amounted to \$2510.

Q. Is that why the contract was made out in the sum of \$2510?

A. Yes. (Tr. 458.)

ABE ZEMANSKY

CROSS-EXAMINATION

MR. DIENSTAG: Q. Before you entered into the contract with Mr. Kleinman, Mr. Zemansky, did you furnish Mr. Kleinman with any slips like ~~these~~ each day?

A. Before we entered into the contract?

Q. Yes.

A. Not before February 27.

MR. DIENSTAG: Q. Do you know what this book is, Mr. Zemansky?

A. A register we kept for the pledges we had in Mr. Kleinman's drawer.

Q. This contained all of the numbers of the pledges which went to secure Mr. Kleinman's contract, is that correct; these are the numbers that appeared in Mr. Kleinman's contract?

A. Yes sir.

THE REFEREE: This is Kleinman's Exhibit number 6.

MR. DIENSTAG: Q. Who stamped these, did you?

A. One of the girls in the office.

Q. Now, Mr. Zemansky, when a pledge was redeemed, it was stamped redeemed on the date it was redeemed, is that correct?

A. Yes sir. (Tr. 377.)

LEO KRAVITZ

DIRECT EXAMINATION

Q. BY MR. CHOTINER: All I am trying to find out is this, whether you remember any conversation of any kind had with Mr. Kleinman and yourself regarding the subject matter of the business relationship between Kleinman and the Zemanskys.

A. Well, the only business transaction I had with Mr. Kleinman was, Mr. Kleinman told me to keep the numbers right on the pledges. (Tr. 282.)

LEO KRAVITZ

CROSS-EXAMINATION

Q. Now, Mr. Kravitz, you have stated that when the loan was redeemed, you would put that particular ticket, the redeemed ticket, upon a spindle?

A. Yes sir.

Q. And by that you mean — I am sorry, your Honor, perhaps I should have kept this a little longer — you would take the original ticket, the large ticket which the customer had, and put it on the spindle?

A. Yes sir.

Q. And before you did so, you would mark on this large ticket which the customer had had in his

possession, some mark that would identify that as a Kleinman pledge ticket?

A. Yes sir.

Q. What did you do at the end of the day with regard to those tickets that were on the spindle?

A. At the end of the day, I would go over every one of the tickets and look for all the Kleinman, Bob Gans and Simon tickets, and just segregate them.

Q. But if there were not any Simon tickets or Gans tickets, you would look for the Kleinman tickets, is that correct?

A. Yes sir.

Q. And you would segregate them?

A. Yes sir.

Q. Would you note the numbers of those in any way?

A. Yes sir. (Tr. 313.)

Q. Where would you put the numbers?

A. I would put them on little tabs, the numbers and the amounts.

Q. What would you do with those tabs?

A. The next morning I would give them to Mr. Kleinman.

Q. When these were made up, you would give them to Mr. Kleinman?

A. Yes sir.

Q. So you gave him a record of—

A. What was redeemed.

Q. On the day before?

A. Yes.

Q. With regard to the stub in this book, which was redeemed, which remained in the book, what would you do with regard to that?

A. That was left in the book.

Q. Would you mark that in any way?

A. They were marked redeemed.

Q. When you handed to Mr. Kleinman this little tab with the numbers of the pledges which had been redeemed, would you give those numbers to anybody else?

A. No sir, I would give it to Mr. Kleinman; that's as far as it would go.

Q. You didn't give it to your employers?

A. I think Mr. Kleinman would give it to them.

Q. Mr. Kleinman would give it to your employers?

A. Yes.

Q. And do you know whether a record was kept of these Kleinman pledge books and any other pledge books in the Provident Loan Association? (Tr. 314.)

A. I think Abe Zemansky would take care of that. (Tr. 315.)

Q. Mr. Kravitz, earlier today in your examination, or cross-examination, you stated that you had put these redeemed tickets, the large portion of the pledge that the customer had, on a spindle, and that at the end of the day you would copy the numbers down, which referred to the Kleinman pledges, which were redeemed, and then you would hand that slip to Mr. Kleinman.

A. Yes sir. (Tr. 325.)

Q. Then you gave that ticket to Mr. Kleinman, as a record of the pledge which had been redeemed and the amount of the pledge?

A. Yes sir.

Q. And this was, of course, the procedure that you followed every day from the day that you had selected the pledges until the time that the Provident Loan Association was closed?

A. Yes sir. (Tr. 326.)

SAM KLEINMAN

DIRECT EXAMINATION

Q. After that, did you receive these slips showing what redemptions had been made the day before on your pledges?

A. Yes sir.

Q. And you kept track of those slips?

A. Yes.

Q. Did you ever add them up, Mr. Kleinman?

A. Yes sir.

Q. How did you add them up?

A. Well, if I had one I wouldn't add it up, I could just see it was about \$500 or \$600, but when I had a few redemptions I used to go in Joe Zeman-sky's office, he had an office there, and they had an adding machine and then I would add them up.

Q. Did you ever see what was being done with the money that came in on your pledges?

A. When a customer came in and took the pledges, other ones put pledges in.

Q. Was any record kept of the loans that were made there daily?

A. Oh, yes.

Q. In what book was that, do you recall? (Tr. 455.)

A. You mean for the whole business?

Q. Yes.

A. They made out a sheet every day, how much pledges went out and how many pledges they took in.

Q. Did you ever look at that sheet?

A. I didn't look at that sheet down there, because I wouldn't understand it, but I seen pledge tickets where they delivered for mine, my pledge tickets. My pledge tickets had the initial "K," every pledge ticket had the initial "K," knowing that that pledge ticket was for merchandise put away for me. (Tr. 456.)

No. 10236

IN THE

10
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of Abraham Zemansky, David Zemansky and Sol
Zemansky, doing business under the fictitious names
and styles of PROVIDENT LOAN ASSOCIATION and
STATE LOAN OFFICE, BANKRUPTS,

Appellee.

BRIEF OF APPELLEE.

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FILED

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No. 10236

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Abraham Zemansky, David Zemansky and Sol Zemansky, doing business under the fictitious names and styles of PROVIDENT LOAN ASSOCIATION and STATE LOAN OFFICE, BANKRUPTS,

Appellee.

BRIEF OF APPELLEE.

The record before the court in the case at bar discloses an extremely clever attempt on the part of the Appellant Sam Kleinman and his son-in-law Edward Dienstag to circumvent long-established laws of the State of California with regard to the transfer and hypothecation of personal property in fraud of creditors, and to likewise circumvent the plain provisions of §60-a of the National Bankruptcy Act (11 USCA, §96-a) by procuring for the Appellant Sam Kleinman, security for an obligation in excess of \$100,000.00 due Appellant Kleinman in a manner which would hinder, delay, or defraud other creditors of the bankrupt, Zemansky Brothers, and which

would procure a secret lien on personal property in favor of Appellant Kleinman without any delivery either immediate or otherwise of said personal property to Appellant.

Before going into a discussion of the case, or of Appellant's brief, we shall first set out the statutory provisions applicable to the case at bar as they existed at the time of the interesting transaction which has been annulled by both lower courts, the referee and the district judge. At the time of the transaction involved here, the month of February, 1939, §3440 of the Civil Code of California, in so far as material here, read as follows:

“Every transfer of personal property, other than a thing in action, * * * and every lien thereon, other than a mortgage, when allowed by law, * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer * * *.”

Section 2986 of the Civil Code of California, read as follows:

“Pledge is a deposit of personal property by way of security for the performance of another act.”

Section 2987 of the Civil Code, read as follows:

“Every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge.”

Section 2988 of the Civil Code of California, read as follows:

“Except as otherwise provided in Chapter III-A of Title XIV of Part IV of Division Third of the Civil Code, the lien of a pledge is dependent upon possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledgeholder, as hereafter prescribed.”

The portions of the Civil Code referred to in §2988 deal with mortgages of personal property and pledges.

Section 2990 of the Civil Code reads as follows:

“One who has a lien upon property may pledge it to the extent of his lien.”

Section 60-a of the National Bankruptcy Act (11 USCA, §96-a) reads as follows:

“A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under Chapter X, XI, XII or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a

and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no *bona fide* purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under Chapter X, XI, XII or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.”

The word “transfer” as used in §60-a of the National Bankruptcy Act is defined in §1, subdivision (30) of the Act (11 USCA, §1, subdv. 30, as amended in 1938), as

“ ‘Transfer’ shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise.”

Section 60-b of the National Bankruptcy Act (11 USCA, §96-b), in so far as material here, reads as follows:

“Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.”

Section 60-c of the National Bankruptcy Act (11 USCA, §96-c), reads as follows:

“If a creditor has been preferred, and afterward in good faith gives the debtor further credit *without security of any kind* for property which becomes a part of the debtor’s estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.” (Italics ours.)

Section 70-a of the National Bankruptcy Act (11 USCA, §110-a), reads as follows:

“The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this Act, except in so far as it is to property which is held to be exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered.”

Section 70-e of the National Bankruptcy Act (11 USCA, §110-e), reads as follows:

“(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.”

The preference attempted by the parties thereto in favor of Appellant Kleinman consisted in an attempted transfer, within four months preceding the filing of the petition in bankruptcy, of a large number of pawns to Kleinman, who for a long time had been an employee of the bankrupts in their pawn shop, for the purpose of securing a long past due antecedent debt in excess of \$100,000.00, without delivery of the pawns to Kleinman.

Section 3 of the California Pawn Broker's Act enacted July 15, 1935, Statutes of 1935, Chapter 538, page 1613 *et seq.*, reads as follows:

“Every pawnbroker shall retain in his possession every article pledged to him, except clothing, wearing apparel, furs, trunks, and suit cases, and articles of similar character, for a period of one year after the last date fixed by his loan contract for redemption. He shall keep such excepted articles for a period of six months after the last date fixed for redemption by his loan contract.

“The pledgor or his assigns, may redeem the articles at any time during such period. If such article is not redeemed within the period thus allowed, the pawnbroker shall at the end of that period become vested with all right, title and interest of the pledgor or his assigns therein, to hold and dispose of as his own property. All provisions of law relating to pledges and foreclosure of pledges in conflict with this Act shall not apply to pledges with pawnbrokers under this Act. It shall be a misdemeanor for any pawnbroker to violate any provision of this section.”

The Questions Involved.

From the viewpoint of the Appellee there are just two questions involved, one of law and the other of fact, both of which were decided by the two lower courts adversely to the Appellant. An affirmance by this court of the lower court on either of the questions involved will sustain the order of the referee as affirmed by the District Court. The question of law involved, from our viewpoint, is as follows:

1. IS IT POSSIBLE IN CALIFORNIA, UNDER THE LAWS AS THEY NOW EXIST AND AS THEY EXISTED IN FEBRUARY, 1939, FOR A DEBTOR TO GIVE SECURITY TO A CREDITOR WHICH WOULD BE VALID AS AGAINST OTHER CREDITORS OF THE DEBTOR, BY ATTEMPTING TO HYPOTHECATE PERSONAL PROPERTY IN THE POSSESSION OF THE DEBTOR, IN FAVOR OF SUCH CREDITOR, WITHOUT AN IMMEDIATE DELIVERY FOLLOWED BY AN ACTUAL AND CONTINUED CHANGE OF POSSESSION OF THE PERSONAL PROPERTY OR THE PLACING THEREON OF A CHATTEL MORTGAGE DULY EXECUTED AND RECORDED IN ACCORDANCE WITH THE PROVISIONS OF §2957 OF THE CALIFORNIA CIVIL CODE?

2. ASSUMING, BUT BY NO MEANS CONCEDED THAT SUCH SECURITY CAN BE VALIDLY GIVEN IN THE STATE OF CALIFORNIA, AS WAS ATTEMPTED TO BE GIVEN HERE, WITHIN FOUR MONTHS PRECEDING THE FILING OF THE PETITION BY ZEMANSKY BROTHERS, DO THE FACTS AND CIRCUMSTANCES SET FORTH IN THE RECORD BEFORE THE

COURT JUSTIFY THE FINDING OF THE REFEREE, AFFIRMED BY THE DISTRICT COURT ON REVIEW, THAT THE BANKRUPTS WERE INSOLVENT AND THAT THE APPELLANT HERE KNEW, OR HAD REASONABLE CAUSE TO BELIEVE THAT THEY WERE INSOLVENT AT THE TIME THE SCHEME WAS PUT INTO OPERATION TO SECURE KLEINMAN, AN EMPLOYEE FOR SEVERAL YEARS, OF THE BANKRUPTS, PREFERENTIALLY AND TO THE DETRIMENT OF THE OTHER CREDITORS OF THE ZEMANSKY COPARTNERSHIP, BANKRUPT?

We submit that the latter question was one of pure fact resolved against the Appellant in both of the lower courts.

Argument, Points and Authorities.

In so far as the actual mechanics of the transaction are concerned little dispute exists between the parties to this appeal. Summarized in its briefest manner, Kleinman was apparently a wealthy man, able to lend out large sums of money and anxious to obtain an unusually high rate of interest. It is commonly known that six and seven per cent, or even less, is the usual rate of interest asked on large loans of money where the loan is made to a solvent concern, without security. We have no such picture here. Prior to the interesting transaction entered into in February of 1939 Kleinman held no security for the loans which he had made to this partnership which he now contends he believed to be thoroughly sound and solvent. These loans were in excess of \$100,000.00, as was testified to by Sol Zemansky. [Tr. p. 185.] The interest charged the bankrupts by Appellant from 1933 down to February, 1939, at the time he took his security from the Zemanskys, was in most instances twelve per cent per annum. [Testimony of Sol Zemansky, Tr. p. 99.]

Kleinman became an employee of the Provident Loan Association (the bankrupt copartnership), in 1935, his duties being to dispose of merchandise consisting of foreclosed pledges. [Tr. pp. 99, 100.] He received a salary of \$75.00 per week and one per cent on each sale, from the inception of his employment [Tr. p. 100], down to a time when the bankrupts became sufficiently financially involved that his salary was reduced from \$75.00 to \$50.00

per week, under the pretext that he did not want to spend so much time around the bankrupt's place of business. [Tr. pp. 239, 240.] He started to assist in the Loan Department of the bankrupt in 1936 or 1937, at a time when the disposition of jewelry, as a result of unredeemed purchases, became rather slack. [Tr. p. 101.] In the latter part of 1938 or the early part of 1939 the Appellant first commenced talking to the Zemanskys about security. He said he wanted to go away and rest up and desired to have his money secured while he was away. However, he continued to come up to the Provident Loan Association office every day regardless of the pressing necessity for a rest. [Tr. pp. 102, 103.] Sol Zemansky told him at that time that he was unable to give him security for his money. [Tr. p. 103.] Appellant then apparently demanded payment of a part of the money that was owing to him [Tr. p. 103.] Sol Zemansky apparently told him that the bankrupt was unable to pay him any money. Appellant then suggested "turning over loans" to him for the amount of money the Zemanskys owed him, meaning loans which the Zemanskys had made to customers who had come into their pawnshop. [Tr. p. 104.] Apparently no inquiry was made by Appellant Kleinman at the time of this demand as to indebtednesses owing to other creditors until after he had obtained his alleged security. [Tr. pp. 104, 105.] Sol Zemansky with whom the transaction appears to have been negotiated, can recall no inquiries of that nature prior to the taking of the alleged security by him. [Tr. p. 105.] Even as late as the end of 1938 Kleinman had never asked the Zemanskys for any security for the large amount of money he had loaned to them. [See Testimony of Sam Kleinman, Tr. p. 393.] Apparently he had been content with his 12% per annum interest.

In January, 1939, shortly before an attachment was run on Zemanskys' business Appellant Kleinman went to San Francisco to see his son-in-law, Mr. Dienstag and his daughter, and told Mr. Dienstag that he had left the employ of the Zemanskys. [Tr. p. 394.] He returned to Los Angeles, and according to his version [Tr. p. 395], he had a most casual conversation with Sol Zemansky regarding giving him security for the large indebtedness owing to him. According to his version of the conversation he merely said:

“Sol, I am no more employed by you and how would you like to give me—you know, I left you; how would you like to give me security for my money?” Sol says, ‘Why, Sam, anything I can do for you I will be glad to do it for you, give you security if you want it; of course, I don’t like to have you leave me, but if you want security I will be glad to give it to you.’

Q. Now, when you had that conversation with Mr. Zemansky, had you already left the employ of the Provident Loan Association? A. Yes, sir.” [Tr. p. 395.]

Kleinman never discussed the question of obtaining security with Sol Zemansky from then on. [Tr. p. 397.] From then on all negotiations were had with Kleinman’s attorney, his son-in-law Mr. Dienstag. [Tr. pp. 397, 398.] According to Kleinman he did not ask Zemansky on several occasions for security, and on the one occasion that he did ask for security Sol Zemansky did not even tell him that he would have to take the matter up with his brothers who were his partners. [Tr. pp. 397, 398.]

Mr. Dienstag came down from San Francisco to Los Angeles without being requested to do so by his father-

in-law the Appellant. [Tr. p. 399.] Apparently Appellant went back to San Francisco after speaking to Sol Zemansky about his suggestion that he be given security, and informed his attorney son-in-law of the conversation. [Tr. p. 399.] Mr. Dienstag came down to Los Angeles some time during the month of January and took up with Sol Zemansky the question of securing his father-in-law, notwithstanding the fact that Kleinman testified that he had not employed Mr. Dienstag as his attorney. [Tr. p. 400.] Mr. Zemansky told him that under the Pawnbrokers Law he would not be permitted to repledge pledges. [Tr. p. 401.] He showed him one of their pawn tickets with the statutory provisions on the back, and Mr. Dienstag asked Sol Zemansky to let him take one of the tickets so that he could "look into it." [Tr. p. 402.] According to Kleinman not much of anything was said at that time about taking security and Mr. Dienstag said he would go back to San Francisco and look into the law. [Tr. p. 402.] There was no discussion of any other kind of security ever had between Mr. Dienstag and the Zemanskys. [Tr. pp. 402, 403.] Mr. Dienstag came back to Los Angeles the first part of February and resumed the negotiations. [Tr. pp. 403, 404.] He conceded that the Zemanskys did not have the right to part with possession of any of the pawns of merchandise, but said that he "had a way where we can have security on the pawn tickets." [Tr. p. 405.]

Mr. Dienstag's approximation of the time when he first discussed the question of security with his father-in-law

was that the conversation occurred around the 10th, 11th, or 12th of February, 1939. [Tr. pp. 513, 514, 515.] He went back to San Francisco and returned to Los Angeles again on the 16th or 17th of February. [Tr. p. 515.] A second conversation with Sol Zemansky took place in the presence of Appellant. [Tr. p. 516.] He then proceeded to outline to Mr. Zemansky, in the presence of Appellant, his scheme for circumventing the plain provisions of the Pawnbroker's Act and Section 3440 of the Civil Code, whereby his father-in-law could be secretly secured with the valuable pledges as a basis for the security. [Tr. pp. 516, 517.] Mr. Zemansky very casually called Leo Kravitz, his loan clerk, and told him to pull out about one hundred thousand dollars worth of* *pledges* for Sam. [Tr. p. 517.] They went out to dinner, and after dinner returned to the Provident Loan Association office, opened the vault and brought out two steel boxes containing envelopes with serial numbers, with the amount owing on each pledge on each particular envelope. [Tr. p. 518.] The numbers and amounts were totaled up until about \$107,000 worth of *pledges* had been selected.

The pledges thus selected were placed in three steel boxes marked K-1, K-2 and K-3 and put back in the bankrupt's vault where they had been before. [Tr. pp. 519, 520.]

*NOTE: Where the word "pledges" is italicized the italics are ours. We are italicizing this word frequently to show the free use of the word "pledges" as having been assigned to Kleinman rather than the use of the words "pledge tickets."

A contract, which is in evidence here as Trustee's Exhibit No. 4 [Tr. pp. 110, *et seq.*] was then drawn up and the exhibit attached to it. [Tr. p. 520.] Kleinman signed the contract the next day. [Tr. p. 521.] When he and Mr. Dienstag got ready to have Sol Zemansky sign they learned that Sol had gone up north. Mr. Dienstag left for San Francisco that evening. He took the contract with him and contacted Sol Zemansky's hotel the next morning. [Tr. p. 521.] The day following he contacted Sol Zemansky personally, meeting him about three o'clock in the afternoon. The agreement and the promissory notes were then signed on February 24, 1939. [Tr. p. 522.] Mr. Kleinman arrived in San Francisco the following morning, February 25th [Tr. p. 523] and Sol Zemansky apparently had returned to Los Angeles. He called Kleinman on long distance telephone on February 27, 1939, two days after Kleinman arrived back in San Francisco. [Tr. p. 523.] Mr. Kleinman, accompanied by his son-in-law, Mr. Dienstag, hastily returned to Los Angeles the following morning by airplane and contacted the Zemanskys. [Tr. p. 524.] They were informed that the Zemanskys needed twenty-five or thirty thousand dollars, because the Simons (creditors of Zemansky) had placed an attachment on Zemansky's place of business and the Sheriff was sitting out in the hall. [Tr. p. 524.] An effort was then made to induce Judge Isaac Pacht, attorney for the attaching creditor, to release the attachment. [Tr. p. 527 *et seq.*] This resulted in a new agreement between Kleinman and the Zemanskys whereby pledges which had been

attempted to be hypothecated to Kleinman were withdrawn and rehypothecated to Simon, in order to procure the release of the attachment. [Tr. pp. 531, 532; also Tr. pp. 451, 452, 453, 454.] The pledges to be withdrawn, however, were to be replaced with other pledges. [Tr. p. 532.]

This agreement was arrived at by the following conversation, testified to by Mr. Dienstag at page 531 of the transcript:

“Mr. Zemansky then turned to Sam and he said, ‘Sam, why couldn’t we give him a drawer of your *pledges* and get those numbers so this can be completed while Eddie is here;’ and Sam turned to me and he said, ‘Well, Ed., can we do that?’ I said, ‘Yes, as long as we replace them with other *pledges*.’ Sol said, ‘Well, Sam, is that all right?’ Sam said, ‘Ed is handling this; it is up to him.’ I said, ‘That will be all right, Sol, as long as you put the loan back, replace the *pledges* which you take.’ Sol then called Mr. Leo Kravitz and told him to take a drawer of those *pledges* and get the numbers off a drawer of Kleinman’s, and get the numbers right over to Mr. Ross, so that they could be put in the contract, and as soon as he had gotten the numbers over there to start selecting *pledges* to replace the *pledges* that were taken from the Kleinman drawer. And those numbers, I am not certain whether I took those numbers over to Mr. Ross or whether they were sent over there, but they got over there in a very short time, as soon as they were copied off the Kleinman tickets,

that is, that box of *pledges*, and about 5 o'clock of that day Kravitz had finished selecting the new *pledges* for Kleinman and had given me the numbers, which I took over to my office here in Los Angeles and handed to Mr. Horn, I think it was, to have copies for me for the basis of a new contract." [Tr. pp. 531, 532.] (*Italics ours.*)

At the time money had started coming in redeeming *pledges* which had been assigned by the bankrupts to Kleinman, instead of turning it over to Kleinman in payment of the large obligation owing to him, Sol Zemansky suggesting relending it again. Kleinman agreed, after conferring with his son-in-law Mr. Dienstag, who said: "Any money that you give them must be loaned out on new *pledges*." Mr. Zemansky said: "That is what we want it for; of course it will be loaned out on new *pledges*." Mr. Dienstag said: "In addition to that, all of the *pledges* that come in the Provident will have to come to secure you." (*Meaning Kleinman.*) (*Parenthetical matter ours.*) Adding the significant statement, "These *pledges* coming in, they are going to be your security." I said, "If you are going to give them money, you get all of the *pledges* coming to you." [Tr. pp. 533, 534.]

Later on, about April 5, 1939, the Zemanskys were apparently encountering difficulty with another creditor, one Gans. Kleinman expressed surprise at the existence of this indebtedness, according to his testimony. [Tr. p. 459.] Another arrangement was entered into whereby some more of Kleinman's pledges were taken out to secure

Gans indebtedness in the sum of \$12,000. [Tr. pp. 459, 460.]

Kleinman's pledges were all kept in the Zemanskys' vault. Kleinman never went into the vault or safe and could not tell of his own knowledge whether his pawns were kept segregated from others. [Tr. p. 490.] He excuses his failure to enter the vault, after taking a purported assignment of over \$100,000 worth of pledges, at page 497 and 498 of the Transcript, on the ground that Kravitz had told him that he was more of a nuisance than a help. [Tr. p. 498.] The money that was taken in from customers in redemption of pledges went back into the bankrupt's business and was reloaned out the same as other money. [Tr. pp. 507, 107, 108, 363.]

Kleinman on occasion would give Abe Zemansky a check which would be cashed at the Union Bank, the currency handed over to Kleinman to apply on the note and then the currency put out in new loans. [Tr. p. 109.] When Kleinman handled the redemption of any pledges which had been purported to have been assigned to him, himself, the money went into the cash drawer just the same as when the redemption was handled by Kravitz or Sago, the loan clerks. [Tr. pp. 340, 341.]

Kleinman occasionally examined the cash drawer both before and after obtaining his alleged security. If he did not find any money in the cash drawer of this money lending institution he would say "Nicht gut," meaning "No good." [Tr. p. 341.]

At the Time of the Execution of the Agreement Bearing Date of February 24th, on Which Claim for Security Was Based, the Zemanskys Were Insolvent, and That Condition Continued Down to the Date of Bankruptcy, and Appellant Kleinman Knew, or Had Reasonable Cause to Believe That a Condition of Insolvency Existed and That His Alleged Security Would Constitute a Preference Over Other Creditors of the Bankrupt.

We shall address ourselves, first, to the question of whether or not the attempted assignment of these pledges to Kleinman was preferential, for the reason that if it was, it must fall, regardless of whether the assignment consisted of an assignment of pledge tickets or an assignment of tangible pawns.

The bankrupt copartnership and each of the partners filed Schedules in Bankruptcy which were received in evidence by reference as Trustee's Exhibit No. 7. [Tr. p. 186.] This exhibit was likewise before the District Court on review [Tr. p. 53] and is before this court in the amendment to the record proposed by Appellee. An examination of these Schedules, or their summary, shows a hopeless condition of insolvency. The partnership liabilities, secured and unsecured totaled the sum of \$1,341,698.66, according to the recapitulation of the original Schedules filed, together with the Amendment to Schedule of creditors which added the sum of \$4,000.00 to the original indebtedness. This does not take into consideration the tax claims or warehouse rent, the amounts of which were unknown. The summary of the Schedule of all the assets of the bankrupt totals \$390,556.24. The Schedule of individual assets of David Zemansky totals only \$100.00, representing cash on hand less than \$100.00;

Schedule of the individual assets of Sol Zemansky likewise totals \$100.00, or less, represented by cash on hand. Abe Zemansky scheduled some assets, including insurance policies which, when added to the individual assets of his brothers and those of the copartnership brought the total assets available to the sum of \$412,584.04, if our arithmetic is correct, making liabilities approximately three times the total assets of the partnership and the individual partners. These figures were confirmed, and all three partners testified that they were approximately in the same condition financially for a year prior to the filing of the petition. [See testimony of Sol Zemansky, Tr. pp. 185, 186; David Zemansky, Tr. pp. 347, 348 and 389, 390; Abe Zemansky, Tr. pp. 387, 388, 389.]

It does not appear to be seriously disputed by the Appellant that a hopeless condition of insolvency existed at the date when the purported security was given February 24, 1941. Kleinman only contends that he had no idea that the Zemanskys were, or might be insolvent.

When we refer to February 24th, 1941, we do not, however, concede that the agreement was executed on that date. On the contrary the evidence shows that it was signed by Sol Zemansky at San Francisco around the 24th or 25th of February. It was not, however, signed by the other partners until the night of the 27th of February, after the Simons attachment had been run and the sheriff was in possession of the bankrupts' places of business.

David Zemansky testified [Tr. p. 349] that it was on the night of the Simons deal at the Provident Loan office, participated in by William Simon, Mike Lyman and a representative from Isaac Pacht's office that the signatures of himself and his brother Abe were affixed to the con-

tract dated February 24, 1941. Abe Zemansky testified [Tr. p. 63] that he believed it was on the 27th of February when they were straightening out the attachment on the place with Simons for the money that they owed him, and that it was signed by them that night. Furthermore, it was Abe Zemansky's recollection that the agreement had not even been signed by Kleinman at that time, although he was there that night. [Tr. p. 364.]

It was conceded by Mr. Wolver, Kleinman's attorney at the trial, that Kleinman was in a highly nervous condition, having, to quote his exact words, "a nervous relapse at that time." [Tr. p. 265.] Simon had assumed a very threatening manner, according to Sol Zemansky, speaking in a loud tone of voice and telling the bankrupts that "they would have to pay off, or else." [Tr. p. 264.] Sol Zemansky told him it could not be done that way. [Tr. p. 264.]

Kleinman testified at page 476 of the Transcript, that he did not know if Zemanskys owed any money on February 24th. This cannot be said to have been the situation on February 27th, 28th, and at subsequent times. There seems to be no question but that the agreement was actually executed on either February 27th or February 28th. David and Abraham Zemansky were under the impression that the conference between the bankrupts and Judge Pacht and Kleinman took place on the evening of the 27th and that the agreement was signed at or after the conference. Mr. Dienstag, however, fixed the conference as having been held on February 28th between 8 o'clock and midnight. [Tr. pp. 526, 527.]

At the time the two Zemanskys and probably Kleinman signed this agreement on the night of the 28th, Klein-

man certainly had ample notice that something was radically wrong financially in the Zemansky institution. Sol Zemansky had frantically telephoned Kleinman at San Francisco a day or so before that, to come to Los Angeles, without apparently informing him what the trouble was. On his arrival at Los Angeles he and his son-in-law, Mr. Dienstag, went directly to the Provident Loan Association and Kleinman said to Sol Zemansky, "What is this matter, you want twenty-five or thirty thousand dollars?" [Tr. p. 524.] Sol told him that Simon had run an attachment on their business and they wanted the money to lift the attachment. The fact that an obligation of twenty-five or thirty thousand dollars or more was long enough past due to warrant the holder of it in suing and attaching their places of business should have put Kleinman on his inquiry as to the financial condition of a firm which was then under attachment and which was having to pay the prohibitive rate of 12% interest for money, when if it were regarded as a good credit risk, could have obtained the same funds from a bank at seven or eight per cent or less.

The question of insolvency of the Zemanskys arose at this conference also, when Judge Pacht asked Sol Zemansky whether or not they were insolvent or, as Judge Pacht put it "bankrupt". [Tr. pp. 510, 511.] Judge Pacht put it up to Sol Zemansky, as follows:

"If you can't pay your debts in full, tell us so and we will know where to go from there. It is not the first time that a creditor has had to write off an obligation in whole or in part."

This discussion as to solvency of the partnership was brushed aside with the offhand statement that they had

more assets than liabilities but were hard pressed for cash. Kleinman was present at that conversation. [Tr. pp. 511, 512.] Arrangements were then made to use some of the pledges which had been set aside for Kleinman to secure Simons, at least in part. [Tr. p. 531.]

Nowhere in the record is there any evidence that this Appellant or his son-in-law asked the Zemanskys or any of them, *how much* they owed. Later on in April, part of Kleinman's pledges were used to secure one Bob Gans on an indebtedness. [Tr. pp. 459 to 462.] Kleinman testified that he was surprised when he learned that they owed money to Bob Gans, but despite his surprise there appears no evidence that he inquired how much was owing, but very pliantly consented to the diversion of \$12,000 worth of his pledges to go as security to Gans. [See Tr. p. 460 and Kleinman's Exhibit No. 8, Tr. p. 463 *et seq.*]

Considering the magnitude of Kleinman's claim, the fact that he had been in the employ of the Zemanskys for several years, had an office right in their place of business [Tr. p. 237], was thoroughly familiar with the value of pawned gems, and had acted for years as a sales agent for the bankrupts on foreclosed pawns, it would be logical to assume that when the sheriff descended on Zemanskys' places of business with a writ of attachment, and with Kleinman, a shrewd moneylender, about to take security for well in excess of \$100,000.00 worth of obligations due him, if he were acting in good faith, in so far

as his ignorance of the bankrupts' insolvency was concerned, he would have at least asked the Zemanskys for a full statement of *how much* they owed to people other than himself, and with that knowledge in his possession he could have made at least a rough appraisal of the assets available to meet those liabilities and realized that he had no right to take security, or at least no reason to depend upon its validity because of the possibility of bankruptcy ensuing within four months. It should have been a very simple matter, before the execution of the agreement, dated February 24th but actually not executed until February 28th, to have sat down with the Zemansky brothers, or any of them, and totaled up their accounts payable and notes payable from their books, and if he had done so Kleinman would have found that the Zemanskys actually owed \$1,341,698.66, or thereabouts. He would have learned that they did not know how much they owed in social security and other taxes, which would enhance their liabilities. Instead of that, he appears to have studiously avoided asking any direct questions as to their liabilities, and the lower courts were right in assuming from the facts surrounding the transaction that he knew, or had reasonable cause to believe that the bankrupts were insolvent on or about February 24, 1939, when the arrangement to take security got underway.

Another circumstance which may be taken into consideration was the speed with which this transaction was consummated. Kleinman had worked for the Zemanskys for many years. According to him his health suddenly

gave out and practically over night he decided he was going to quit and he wanted security for his money. He went to San Francisco and conferred with his attorney son-in-law. They came to Los Angeles almost immediately and negotiations were opened with Sol Zemansky to secure Kleinman. Mr. Dienstag went back to San Francisco and then came back to Los Angeles and prepared the agreement dated February 24th. When the mechanical work of preparing the agreement was completed Messrs. Kleinman and Dienstag discovered that Sol Zemansky had been called to San Francisco on business. Mr. Dienstag promptly followed Sol Zemansky to San Francisco and contacted him through his hotel. He obtained Sol's signature on the agreement there. Kleinman then hurried to San Francisco and Sol Zemansky came back to Los Angeles. Shortly after Kleinman arrived in San Francisco Zemansky called him from Los Angeles on long distance telephone and apparently informed him they were in trouble of some kind. [Tr. pp. 411, 412, 413.] Kleinman rushed back to Los Angeles by plane, accompanied by Mr. Dienstag. [Tr. p. 524.] According to Kleinman, Mr. Dienstag was either afraid to ride on a plane or did not like it. [Tr. p. 452.] Apparently the exigencies of the situation required that he overcome his aversion to this more efficient and speedy means of transportation, and he came down with Appellant and stayed with him throughout the negotiations on the night of February 28th, and then took another plane right back to San Francisco. [Tr. p. 536.]

This shuttling back and forth repeatedly between San Francisco and Los Angeles, a distance of approximately five hundred miles over a period of four or five days clearly indicates the pressure under which Kleinman and his attorney were laboring to get this security transaction "buttoned up" at the earliest possible moment before something happened.

Kleinman's intimate contact with the Zemanskys could very easily lead the trier of fact to conclude that he knew something about the menacing attitude that was being assumed by Simon, which culminated in the levy of the attachment, even before the agreement bearing date of February 24, 1939, had been fully executed. The fact that Kleinman was on the verge of a nervous collapse at the conference held on the night of February 28th at which Simon told Zemansky in a loud tone of voice that "they had better pay up, or else," was merely the culmination of a dammed up emotional strain existing over a period of days which manifested itself in the hectic movements back and forth of Appellant and his son-in-law Mr. Dienstag between Los Angeles and San Francisco.

We respectfully submit that there is more than sufficient evidence in the record, of the insolvency of the Zemanskys, and of reasonable cause to believe that that condition existed, on the part of Kleinman, and that the Referee who saw the witnesses and heard their testimony from their own lips was the best judge of their credibility, their sincerity and of the interpretation and construction

to be placed on the circumstances surrounding the transaction. On conflicting evidence he concluded, despite Kleinman's pious protests of surprise and ignorance, that the circumstances surrounding the transaction were such as to cause a reasonably prudent man to make an investigation into facts which were at his finger tips, which investigation would have easily demonstrated the hopelessly insolvent condition of the Zemanskys. The subterfuge resorted to in the subsequent contracts in an endeavor to make it appear that Kleinman continued to make new loans to the bankrupts by manufacturing cancelled checks drawn in favor of the bankrupts on Kleinman's daughter's bank account, cashing the same and immediately returning the money to Kleinman, certainly went a long way toward impugning the good faith of Appellant. [Tr. pp. 365 to 369, and Tr. pp. 434 to 440.] In fact the transaction in connection with these manufactured checks was so unusual that it even attracted the attention of the impersonal bank teller at the Union Bank, at whose window these checks were repeatedly cashed, causing him to inquire of Abraham Zemansky the reason for it. Kleinman, on being informed by Abe Zemansky of the teller's inquiry, told him to tell the teller that it was Kleinman's own money in the bank and it was no business of the teller's to inquire of him the system of putting the money back again. [Tr. p. 368.] After the teller's suspicions had been aroused Kleinman then changed the system to making out two checks instead of one and presenting them at different times to get the cash to circulate in the merry-go-round

operated between the Zemanskys and Kleinman. [Tr. p. 368.]

We submit that people acting in good faith do not choose round-about and devious methods to accomplish legitimate business transactions, where such devious methods can be avoided. To say the least it is inefficient, and a business man shrewd enough to exact ten and twelve per cent on his money over a period of years certainly is not going to throw money away on airplane trips back and forth between Los Angeles and San Francisco and go through a complicated system of cashing checks at a bank, in company with another party and circulating the money back to its source in cash thereafter, as was done here. Both the referee and the district judge saw through this subterfuge. In fact, District Judge Hollzer in his opinion [Tr. p. 80] states that the explanation given by Appellant of the transaction "challenges one's credulity." Possibly the referee and district judge were also impressed with the apparent speedy recovery of Kleinman's health and from his nervous condition after he had obtained his security.

Bearing in mind the fact that he claimed his reason for wanting security was that he was resigning because of his health, it is significant to note from an examination of the record throughout that he still remained with the Zemanskys after the contract of February 24th had been executed, had numerous dealings with them at the Union Bank, and apparently made himself such a nuisance around the vault that, according to his own testimony, the loan clerk asked him to stay out of the vault when people came in to redeem their pledges and let the loan clerk take them out. [See Tr. pp. 456 to 461; 471, 472; 485 to 488 and 498, 499.]

The Law on the Question of Preference.

That transactions of the nature of those had between the bankrupts and Kleinman clearly constitute a preference is well-settled by the recent case of *In the Matter of Quaker City Sheet Metal Co., Bankrupt*, 129 Fed. (2d) 894, 50 Am. B. R. (N. S.) 345, a case similar to the case at bar, where accounts receivable were pledged without notice to the debtor of the assignment of his accounts. The Circuit Court of Appeals for the Third Circuit held in that case that the assignment was not perfected as against subsequent *bona fide* assignees or as creditors, and that under the provisions of §60 of the Bankruptcy Act it would be deemed to have been made immediately before bankruptcy. In the case at bar no notice was given to any of the borrowers that their pledges or their pawn tickets had been given to Appellant Kleinman as security. [Tr. p. 190.]

In *Banco Commercial De Puerto Rico v. Boscana*, 100 Fed. (2d) 449, 38 Am. B. R. (N. S.) 632, the Circuit Court of Appeals for the First Circuit said:

“A bankrupt’s purported delivery of merchandise to a creditor by a notarial deed intended to identify the merchandise covered by a previous defective contract of sale and resale, such contract having been given as a pledge to secure payment of an indebtedness of the bankrupt, constitutes a voidable preference under §60 where such delivery occurs within four months of the filing of the petition in bankruptcy, although the original contract was prior to the four months period.”

In the case at bar it is undisputed that both the pledges and the pawn tickets remained in the possession of the

bankrupt throughout and were never under the dominion of Appellant.

In *Wolfe v. Bank of Anderson*, 238 Fed. 343, 38 Am. B. R. 387, the Circuit Court of Appeals for the Fourth Circuit reversed an order of the District Court sustaining a transaction similar to the one here, where pledged accounts were permitted to be collected by the bankrupt and new accounts substituted over a period of years, ultimately extending down to within four months preceding the filing of the petition. The Circuit Court of Appeals held that such a transaction constituted a voidable preference under §60 of the Bankruptcy Act.

For other cases along the same line see:

In re Busby, 124 Fed. 669, 10 Am. B. R. 650;

First National Bank v. Ragsdale, 294 Fed. 382, 2 Am. B. R. (N. S.) 255 (C. C. A. 5th Cir.).

a case where the assignment was made for a past due indebtedness after an attachment had been levied on the bankrupt's property; the assignment being executed pursuant to an oral agreement made more than four months prior to the filing of the petition, but actually executed within that period.

Gould v. Nathans, 1 Fed. (2d) 458, 2 Am. B. R. (N. S.) 790 (D. C. Mass.);

Matter of Robert Jenkins Corporation, Bankrupt, 1 Fed. (2d) 979, 7 Am. B. R. (N. S.) 504 (D. C. Mass.);

Lone Star Cement Corp. v. John B. Swartwout, 93 Fed. (2d) 767, 35 Am. B. R. (N. S.) 216 (C. C. A. 4th Cir.).

The Case at Bar Is so Nearly Parallel to the Case of *Benedict v. Ratner*, 268 U. S. 353, 45 Supreme Court 566, 6 Am. B. R. (N. S.) 9, That the Order Appealed From Should Be Affirmed on the Authority of That Case Alone.

The case of *Benedict v. Ratner*, 268 U. S. 353, involved a situation very similar to the case at bar. The case arose in the Southern District of New York. The law of New York with regard to assignments of choses in action is much more liberal than is the law of California. In New York it is not required, in order to make an assignment of choses in action valid as against subsequent purchasers in good faith, that any notice be given to the debtor. The contrary is the rule in California. The bankrupt in that case assigned as collateral for certain loans, all of its accounts, present and future. No notice was given to the debtors, as it was not required under the New York rule. The bankrupt was permitted to retain the accounts, to make the collections thereon, and to use the money derived therefrom in connection with its business the same as Kleinman permitted the bankrupts here to do. The assignee of the accounts was given the right at any time to demand a full disclosure of the business and financial conditions, to require that all amounts collected be applied on the payment of his loans, and to enforce the assignment, though no loan matured. Unless such demand was made the bankrupt was not required to apply any of the collections to the repayment of Ratner's loan. The existence of the assignment was to be kept secret and the business was to be continued as theretofore.

The trustee attacked the transaction in the United States District Court for the Southern District of New York

unsuccessfully. The Circuit Court of Appeals for the Second Circuit affirmed the order of the District Court. (*Benedict v. Ratner*, 282 Fed. 12.) The Supreme Court of the United States, in reversing the judgment of the Circuit Court of Appeals, after stating that "the rights of the parties depended primarily upon the law of New York" (*Hiscock v. Varick Bank*, 206 U. S. 28) said:

"The results which flow from reserving dominion inconsistent with the effective disposition of title must be the same whatever the nature of the property transferred. The doctrine which imputes fraud where full dominion is reserved, must apply in assignment of accounts, although the doctrine of ostensible ownership does not. There must also be the same distinction as to degrees of dominion. Thus, although an agreement that the assignor of accounts shall collect them and pay the proceeds to the assignee will not invalidate the assignment which it accompanies, the assignment must be deemed fraudulent in law if it is agreed that the assignor may use the proceeds as he sees fit.

"In the case at bar the arrangement for the unfettered use by the company of the proceeds of the accounts precluded the effective creation of a lien and rendered the original assignment fraudulent in law. Consequently the payments to Ratner and the delivery of the September list of accounts were inoperative to perfect a lien in him, and were unlawful preferences. On this ground, and also because the payment was fraudulent under the law of the state, the trustee was entitled to recover the amount."

The case of *Young v. Upson*, 115 Fed. 192, cited by Appellant at page 19 of his brief, is easily distinguishable on the facts. In the first place, the opinion affirmatively

states that: "The proceeds of accounts collected were immediately paid to the lender." That is not the case here. The opinion also states that it was not essential to the validity of the transfer that notice should have been given to the debtors whose claims were assigned. It will be noted, however, that that case was a Second Circuit case where the New York rule was applied. The rule in California is otherwise, and in the case at bar prevails.

Hiscock v. Varick Bank, 206 U. S. 28.

The matter of *Federal Piano Corporation*, 37 Fed. (2d) 556, cited at page 23 of Appellant's brief is likewise distinguishable on the facts. The facts indicate that in that case every sixty days, the bankrupt was required to apply all collections made on the accounts to the curtailment of the note, and that every dollar collected was ear-marked for the specific purpose mentioned.

In the case at bar, where were any of the proceeds of collection on the pawns or pawn tickets applied toward the reduction of Kleinman's indebtedness? Invariably whenever collections were made, if the money was turned over to Kleinman at all it was immediately handed back either through the medium of a check jointly cashed by Appellant and one of the bankrupt partners, or if made in currency, was dropped into a drawer in Kleinman's desk and given back to the bankrupt. [Tr. pp. 485 to 487.]

In the *Federal Piano Corporation* case, *supra*, the court said:

"The test in all such cases seems to be whether the assignor retains unfettered dominion over nominally assigned accounts and their proceeds. If so, the assignment is fraudulent. Otherwise it is not."

The two lower courts unqualifiedly found as a fact that Kleinman had not retained unfettered dominion over the nominally assigned pawn tickets and united in the conclusion that the assignment was not made in good faith and for a present consideration.

See *Chapman v. Emerson*, 8 Fed. (2d) 353, cited by Appellant at pages 20 and 21 of his brief.

In *Pender v. Chatham Phenix National Bank & Trust Co.*, 58 Fed. (2d) 968, 21 Am. B. R. (N. S.) 315, the Circuit Court of Appeals for the Second Circuit reversed a decree for the defendant, in the following language:

“The sole dispute is whether they (the facts) gave the bank reasonable cause to believe that a preference would be effected by the payment. The District Judge expressed the opinion that the case was ‘pretty close,’ but concluded that the bank did not have reasonable cause to believe that its debtor was insolvent in the bankruptcy sense. With this conclusion we are unable to agree. The bank knew that for six months Sugarman had been increasingly slow in paying his bills, that his commercial credit rating had been withdrawn by the National Credit Office, that his bank balances had steadily dwindled, and that he would be without banking credit when forced to close his account with it. It had expressed dissatisfaction with Sugarman’s explanation of his former partner’s overdrawing account, and it resorted to the unusual procedure of requiring payment of its debtor’s notes before they were due and out of discounted bills receivable. It realized that its loan was ‘very shaky,’ and was advised by Mr. Debevoise to get assigned accounts as security until it could work out of the risk. These circumstances raised more than suspicion of danger;

we think they were enough to put the creditor upon inquiry touching the debtor's insolvency and that adequate inquiry would have disclosed his insolvency. *In preference cases, notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would have disclosed.* (Italics ours.) See *Wright v. Skinner Mfg. Co.*, 162 Fed. 315, 20 Am. B. R. 527 (C. C. A. (2nd Cir.)); *Boston National Bank v. Early*, 17 Fed. (2d) 691, 9 Am. B. R. (N. S.) 460 (C. C. A. 4th Cir.); *Ridge Avenue Bank v. Sundheim*, 145 Fed. 798, 16 Am. B. R. 863 (C. C. A. 3rd Cir.) *Shale v. Farmers' Bank* (Kan. Sup. Ct.), 82 Kansas 649, 109 Pac. 408."

In the case at bar the repeated shortage of cash, the rejection of loans for that reason, the necessity on the part of the bankrupts of paying 12% for private money where if they had bank credit they could have obtained the money at a much lesser rate of interest, the belligerent attitude of at least one large creditor, Mr. Simon, the attachment levied on their places of business, the speed and haste with which the transaction was consummated, we submit brings the case at bar well within the limits of the holding in the previously cited cases.

That Kleinman was aware of a shortage of money to make loans and the rejection thereof prior to taking his security is evidenced by the testimony of the loan clerk, Leo Kravitz. [See Tr. pp. 281, *et seq.*]

"Q. Did you ever turn down loans because there was not sufficient money in the cash drawer? A. Yes, sir.

Q. Was that before Mr. Kleinman got the security? A. Yes, sir.

Q. And were there very many occasions like that? A. Off and on.

Q. Did these occasions arise after you had called Dave Zemansky for money? A. Yes, sir.

Q. And did those occasions arise after you asked Mr. Kleinman for money? A. Yes, sir. * * *

Q. Did you and Mr. Kleinman ever sit around and talk on any of those occasions? A. We use to talk about diamonds and the loans.

Q. Did you ever talk about the condition of the business at the Provident? A. Yes, we talked about it.

Q. What was your conversation? A. The condition of the business and how you are going to make loans.

Q. Who said that? A. There is no money in the till, Mr. Kleinman used to say that.

Q. Give us the rest of the conversation? A. I said, 'Well, Sam, if we can't make any loans, I will get some money off of Dave or get a little money off of you if a loan comes in.' In the meantime, a redemption would come in and I would loan that money, and I wouldn't have to ask him. This is just casual talk we used to have all day long.

Q. Did those conversations take place prior to the time that security was set aside for Mr. Kleinman? A. Before and after."

The Attempted Repledging of the Pawns in the Possession of the Zemanskys to Kleinman Without Immediate Delivery Followed by an Actual and Continued Change of Possession Was Fraudulent and Void Under the Provisions of §3440 of the Civil Code of California and §70-e of the Bankruptcy Act (11 U.S.C.A., §110-e).

At the opening of this brief we set forth the provisions of §3440 of the Civil Code requiring immediate delivery followed by actual and continued change of possession of all personal property other than things in action, and every lien thereon, other than a mortgage, when allowed by law, as being conclusively presumed to be fraudulent and void as against creditors of the transferor.

We also set out the statutes of this State regarding the necessity for delivery of personal property sought to be pledged.

The appellant has sought to circumvent these plain statutory provisions by contending that it was not the intent of the parties to pledge the pawns as security for Mr. Kleinman's claim, but that they only intended to pledge the pawn tickets, the evidences of the debt. This, appellant contends, does not bring the transaction within the provisions of §3440 of the Civil Code nor within the various statutory provisions relating to pledges, inasmuch as "things in action" are expressly excepted from the provisions of §3440.

The referee and the District Court were both satisfied, from the evidence in the case, that it was not the mere naked pawn tickets that Mr. Kleinman relied upon as security, but the tangible pawns by which the pawn tickets themselves were secured.

In his excellent opinion District Judge Hollzer [Tr. pp. 73, 74] analyzed this contention, in the following language:

“By admitting that under California law a pawnbroker is prohibited from pledging ‘tangible pawns’ prior to the expiration of the time within which the same may be redeemed, and by contending that ‘the true object of Kleinman’s pledges were the customers’ pawn tickets,’ does claimant thereby concede that he asserts no interest in said ‘tangible pawns,’ that he has no right to control the disposition of the same, and that he is not entitled to have the proceeds derived from the sale thereof applied toward the payment of said notes?

In neither of the briefs filed on behalf of claimant have we found an unequivocal, affirmative answer to this question. The oral argument likewise gave no such answer. * * *

Examined in the light of the restrictions sought to be imposed by the terms and conditions set forth in the provision last quoted, the acts and conduct of the parties, not merely those referred to in the above mentioned fourteen separate and distinct steps, but also those disclosed by the balance of the evidence, clearly demonstrate that the parties to said contract considered that the ‘customers’ pawn tickets’ as distinguished from the ‘tangible pawns’ that is to say, that these so-called choses in action, if separated from and deprived of the security represented by the ‘tangible pawns,’ had virtually no value. Accordingly, as shown by the evidence, claimant undertook through various devices to effectuate not merely the segregation and identification of some 1200 pawn tickets, but also the segregation and identification of the corresponding ‘tangible pawns,’ which alone gave

these choses in action whatever value they possessed as security for the payment of the notes held by him. All of this was designed to deprive the bankrupts of all real control over such 'tangible pawns,' and to transfer the same to claimant, and thereby bring about the surrender, and in effect, the pledge of such 'tangible pawns' to the latter.

Obviously claimant never has been willing, and in this proceeding has not offered, to allow the proceeds from the sales of these 'tangible pawns' to be disposed of on the basis that he has no lien thereon, and has never acquired any primary claim thereto.

Thus it becomes clear that through the instruments executed by claimant and the bankrupts, and by the acts and conduct of the parties, the former undertook to secure a pledge lien upon the 'tangible pawns,' and thereby accomplish indirectly that which the law forbade the bankrupts as pawnbrokers from doing directly."

That it was the intent of the parties to convey the benefit of the tangible pawns as security to Kleinman is clearly evidenced by the Seventh and Ninth paragraphs of the Agreement bearing date of February 24, 1939. [Trustee's Exhibit No. 4.] These paragraphs are found at pages 115 and 116 of the Transcript of Record. Under the Seventh clause of the Agreement the Zemanskys were required to retain in their possession every article pledged and pawned to them in respect to and by virtue of the foregoing pawn tickets, and in the event of default on the part of the customers, were required to retain the articles so pledged and pawned for the benefit of and to the order of Mr. Kleinman.

In paragraph Nine of the Agreement it was made very clear that Kleinman was not to be deemed to be either a partner or a joint adventurer with the Zemanskys, but was to be merely a lender, creditor, or pledgor of the parties.

It is inconsistent, with these provisions, for appellant now to claim that the pawn tickets were separable from the tangible pawns and that it was merely the pawn ticket, or right to receive money therefrom, that he was relying upon for security. If he were merely relying upon the pawn ticket, why the provision in Trustee's Exhibit No. 4 for the retention by the Zemanskys of the tangible pawns either before or after foreclosure?

It is also to be noted that Trustee's Exhibit No. 4 gives Kleinman no dominion over either the pawns or the collections. Paragraph Four of Trustee's Exhibit No. 4 [Tr. p. 114] expressly provides that the Zemanskys were to collect any sums of money which might be due, owing or unpaid upon and in respect to each of the pawn tickets and pledge agreements, and that they were to hold such proceeds in trust for the purpose of applying the money so collected to the payment of the twenty promissory notes. In other words, dominion over the pawn tickets, dominion over the pawns, and dominion over the collections was expressly reserved in the debtor. That the money received from the redemption of Kleinman's pledges was commingled with the funds of the bankrupt and treated the same as the bankrupt's money is evidenced by the testimony of Leo Kravitz, the loan clerk at page 290 of the Transcript. We quote:

"Q. What did you do, Mr. Kravitz, when a customer would come in and want to make a redemption

of a pledge and that was one of the pledges that had been set aside for Mr. Kleinman? A. I used to go in the vault and get it and give it to the customer.

Q. What did you do with the money that the customer gave you? A. I used to put it in the cash box.

Q. What did you use the money for after you put it in the cash box? A. Loaned it out. * * *

Q. When you put the money in the cash drawer, on one of those redemptions, did you put it in any other section of the cash drawer than the place where you would put any of the money? A. In the same drawer. * * *

Q. I will withdraw the question, Mr. Kravitz, did Mr. Kleinman ever make a redemption of a pledge that has been set aside to him for security? A. Yes, sir.

Q. What did he do with the money when he received it from a customer? A. Put it in the drawer.

Q. In the same manner that you had done? A. Yes, sir.

Q. And was that money used over again for the purpose of making new loans to customers? A. Yes, sir."

It requires no extensive citation of authority to establish the fact that throughout the entire period of statehood in California transfers of personal property and liens thereon, without immediate delivery followed by actual and continued change of possession, with the exception of promptly recorded chattel mortgages, have been held to be null and void as against creditors. The policy of the law in this State has been consistently hostile to secret liens.

See:

Bank of America National Trust and Savings Association v. Sampsell, 114 Fed. (2d) 211, 44 Am. B. R. (N. S.) 88;

Ruggles v. Cannedy, 127 Cal. 290;

Noyes v. Bank of Italy, 206 Cal. 266;

Washington Lumber & Mill Co. v. McGuire, 213 Cal. 13.

But beyond that the policy of the law in California is against the assignments of even choses in action without notice, independent of the statute. It has been consistently held by the Supreme Court of California that the pledging of choses in action is of no effect as against a subsequent *bona fide* purchaser, without notice, unless notice is given to the debtors of the pledging of their obligation to the assignee thereof. This admittedly was not done in the case at bar. Sol Zemansky testified at page 190 that the bankrupt never sent any notice to any of its customers that their pledges had been given to Mr. Kleinman as security, nor were any notices of any kind sent to those customers regarding that subject matter, and that collection on those pledges was made by any of the employees of the place, and that if any of the customers failed to redeem the pledge within the time allowed, notices were sent to them by the bankrupt regarding the interest, at three months, nine months and twelve months, and unless the pledge was then redeemed, they would dispose of the pawn as an expired pledge. [See Tr. p. 190.] This testimony of Sol Zemansky stands uncontradicted.

Section 60-a of the Bankruptcy Act has been strengthened by the amendment of 1938, placing the trustee, where

a preference is concerned, in the same status as that occupied by a *bona fide purchaser* from the debtor. We quote from the language of §60-a:

“For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected *that no bona fide purchaser from the debtor* and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under Chapter X, XI, XII or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.”
(Italics ours.)

See also Section 67D, Subd. 5, as amended in 1938.

For a recent construction of this amendment we again refer the court to the decision of the United States Circuit Court of Appeals for the Third Circuit in the *Matter of Quaker City Sheet Metal Co., Bankrupt*, 129 Fed. (2d) 894, 50 Am. B. R. (N. S.) 345. In that case, as we shall presently point out, the Circuit Court of Appeals had before it a case involving the same rule of State law with regard to assignment of choses in action as we have here. What is the rule in California with regard to the validity of assignment of accounts receivable?

In California, in order to make an assignment of a chose in action or an account valid as against subsequent purchasers or assignees in good faith, notice must be given to the debtors by whom the account or chose in action is owed to the original assignor, and if such notice is not given, the assignment is void as against subsequent purchasers or assignees.

In *Graham Paper Co. v. Pembroke*, 124 Cal. 117, the Supreme Court of California was apparently called upon for the first time to determine whether or not in California the English rule with regard to the validity of assignment of accounts or the New York rule should be followed. After discussing the fact that the English rule was well-established, that as between successive assignees of a chose in action, the one that first gives notice to the debtor would prevail, provided at the time of taking it he had no notice of a prior assignment, and after calling attention to the fact that the English rule had been followed by the Federal Courts in this country, the Supreme Court of California said:

“Appellant cites a large number of New York cases in support of its contention, and it must be conceded that they sustain the general proposition that the prior assignee has the better right, though he has not notified the debtor. We think, however, that the doctrine announced by the English courts, and followed by our Federal Courts and the State Courts above mentioned, is based upon the better reason and sustained by the weight of authority. Notice to the debtor not only protects the assignee against payment to the assignor, but against payment to the subsequent assignee, since the debtor, with notice of the prior assignment, would be no more protected by a payment to a subsequent assignee than he would by paying to the assignor; and, besides, an intending purchaser of the accounts from the assignor would have it in his power to ascertain from the debtors, by inquiry, whether any prior assignment existed, and would thus be furnished with the only reasonable protection possible against fraud on the part of the assignor.”

In *Smitton v. McCullough*, 182 Cal. 530, at 535, the Supreme Court of California said:

“Where, however, a person entitled thereto assigns a fund in the hands of a third person, the rule is established in this State that notice to the holder of the fund is necessary to render the assignment valid and effectual as against subsequent assignees without notice and for a valuable consideration. (*Graham Paper Co. v. Pembroke*, 124 Cal. 117; *Widenmann v. Weniger*, 164 Cal. 667; 2 Pomeroy’s Equity Jurisprudence, 4th Ed. §695.) Such notice may be either written or oral. (2 Pomeroy’s Equity Jurisprudence, 4th Ed. §696.)”

In the late case of *City of Los Angeles v. Knapp*, 7 Cal (2d) 168 at 171, the Supreme Court of California, after citing the foregoing cases, again reiterated the principal, in the following language:

“As between two *bona fide* assignees for value, the one who first gives notice to the debtor acquires priority.”

See, also:

The Elm Bank, 72 Fed. 610.

Section 67-d, Subdv. (5) of the National Bankruptcy Act (11 U.S.C.A., §107-d(5)) as amended, effective September 22, 1938, contains the identical provision, as does §60-a, with regard to the time when the transfer shall be deemed to have been made; namely, at the time when it became so far perfected that no *bona fide purchaser* from the debtor, and no creditor could thereafter have acquired any rights in the property so transferred, superior to the rights of the transferee therein, and if such transfer is

not so perfected prior to the filing of the petition, it is deemed to have been made immediately before bankruptcy.

Now let us examine, in the light of the preceding cases, the situation as it existed in the Provident Loan Association. In the bankrupt's vaults were well in excess of \$100,000.00 worth of valuable pledges deposited by customers as security for loans obtained by them from the Zemansky Brothers. The customer had one pawn ticket and the Zemanskys had another. On the outside of the pledge envelope was the letter "K," and a number on the inside with the pledge. The pawn tickets retained by the Zemanskys had been endorsed with identifying indicia understandable only by the Zemanskys and Kleinman. The pawn tickets remained in the Provident Loan place of business after the arrangement was made between Kleinman and the Zemanskys, as well as before, with the Zemanskys empowered with a secret agency by Kleinman to collect on these repledged pawns. Leaving the prohibition against relinquishing possession on the part of a pawnbroker out of the picture entirely, let us assume that a legitimate, *bona fide* licensed pawnbroker had approached the Zemanskys and opened negotiations to purchase their pawnbroking business; let us assume that the Zemanskys gave him no information whatsoever that over \$100,000 worth of pawns and pawn tickets had theretofore been assigned to Mr. Kleinman; let us assume that the pawnbroker bought the Provident Loan Association business in its entirety and took possession of the pawn shop of the Provident Loan Association, *could Kleinman assert a claim to either the tangible pawns or the pawn tickets accompanying them, as against the claim of this bona fide purchaser of Zemansky's business?* (Italics ours.) We sub-

mit that under the laws of California and under the provisions of both §60 and §67 of the National Bankruptcy Act the answer would have to be an unqualified "NO." That being the case the transfer as defined under §1, Subdv. (30) of the National Bankruptcy Act (11 U. S. C. A., §1 (30)) as amended September 22, 1938, was absolutely null and void as against the trustee, and was also clearly preferential. We can even safely assume, although we do not concede, that had the bankrupts been solvent on February 24, 27 or 28 of 1939 the transfer would still be both fraudulent and preferential, as under both §60 and §67 it was deemed to have been made immediately before bankruptcy, at which time there is not the slightest dispute of the bankrupt's insolvent condition and of Mr. Kleinman's reasonable cause to believe that such condition existed, he having remained around Zemansky's place of business to see the attachment lifted only by hypothecating his own pawns to do so, to the extent of fifty per cent of the Simon loan [Tr. p. 529], and having to do the same, much to his surprise, as appears at Tr. p. 459, with another indebtedness owing Bob Gans, about which he had previously claimed to have known nothing.

As was said by Mr. Justice Brandeis in *Dean v. Davis*, 242 U. S. 438, 38 Am. B. R. 664:

"A transaction may be invalid both as a preference and as a fraudulent transfer. It may be invalid only as a preference or only as a fraudulent transfer."

In that case Mr. Justice Brandeis held that a mortgage given for a contemporaneous loan with the intent on the part of the bankrupt to use it to effect a preference to a bank which held forged notes which he had discounted,

was invalid under §67 of the Bankruptcy Act of 1898 as it existed at that time. Section 67, as it now reads since the 1938 amendment, in so far as material here, is as follows:

“Section 67-d (2-d). Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition in bankruptcy or of an original petition under Chapters X, XI XII or XIII of this Act by or against him is fraudulent, * * * (d) as to then existing and future creditors, if made or incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.”

Subdivision (5) of this sub-section, as pointed out before, fixed the date of the transfer as immediately before the filing of the petition, unless the transfer so perfected was to be unassailable by a *bona fide* purchaser from the debtor of the property.

Subdivision (7) of this sub-section provides:

“Nothing contained in this subdivision d shall be construed to validate a transfer which is voidable under §60 of this Act.”

In the case of *Dean v. Davis, supra*, Justice Brandeis was careful to point out:

“But under §67-e the basis of invalidity is much broader. It covers every transfer made by the bankrupt ‘within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of ‘them’ ‘except as to purchasers in good faith and for a present fair consideration.’ As provided in §67-d. only ‘liens given or accepted in good faith and not in contemplation of or in fraud upon this Act’ are un-

assailable. A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, 'hinders, delays or defrauds creditors' within the meaning of §67-e."

Conclusion.

This case comes before this court after having been thoroughly and painstakingly tried before an able referee who saw the witnesses as they testified, had an opportunity to judge their credibility and their good faith by personal contact with them in the witness box. He unhesitatingly found against them on disputed questions of fact. The findings of fact leave nothing whatsoever to conjecture or speculation as to whether or not this was a *bona fide* transaction or a fraud and a preference. A review was then taken to the District Court. It was argued before Judge Hollzer, commencing Monday, July 21, 1941, as appears at page 557 of the Transcript of Record from the Reporter's Transcript of the proceedings on the argument. That the learned district judge gave this record a most complete, thoroughgoing and painstaking review is evidenced by the fact that the memorandum of conclusions of Judge Hollzer [Tr. p. 55] bears date of February 6, 1942, over six months after the argument.

This is not a case wherein the district judge perfunctorily reviewed the evidence and the law and affirmed the findings of the referee offhand. The memorandum of conclusions of Judge Hollzer, covering 25 pages of the printed record [Tr. pp. 55 to 80] shows a keen grasp, on the part of the reviewing judge, of the facts and a keen penetration into the minds and motives of the parties to this interesting transaction.

We submit there was no error or suggestion of error on these issues in the findings arrived at by the referee and affirmed by the district judge. We submit that this court should not, and we assume will not interfere, in the absence of clear error.

As was said by this Court in *Swift v. Higgins*, 72 Fed. (2d) 791, in an opinion written by Judge Wilbur:

“The referee found that the mortgagor was insolvent at the time of giving the new mortgage, and that the mortgagee had sufficient information to put him on inquiry, which, since it would have resulted in his full appreciation of the situation had it been pursued, is sufficient to charge him with knowledge. The evidence in the record on this subject is somewhat meager owing to the fact that the question of the insolvency of the bankrupt on March 1, 1930, was not seriously questioned by the parties at the hearing. * * * The findings of fact were concurred in by the District Court, and we cannot disturb them, there being substantial evidence to support them. *Monson v. Hibler* (C. C. A. 9th Cir.), 24 F. (2d) 909; *Neece v. Durst*, 61 F. (2d) 591; *Woods v. Naimy*, 69 F. (2d) 892.”

In the case at bar appellant seeks to overturn the concurrent findings of the two lower courts. At page 20 of their brief they cite the case of *Chapman v. Emerson*, 8 Fed. (2d) 353. We quote from the authority cited by appellant:

“The referee and the learned district judge were right in critically scrutinizing their transactions. In the result, however, *they united in the conclusion that the assignment was made in good faith for present consideration*, and that, although the appellees had not

always insisted on the full measure of their rights, they had never intended to surrender, and had not in fact surrendered, to the bankrupt anything approaching 'unfettered dominion' over the accounts or their proceeds."

In the case at bar the referee and the learned district judge, after critically scrutinizing the transaction complained of, "united in the conclusion that the assignment was *not* made in good faith," and with that conclusion we submit that this court should not interfere. (*Italics ours.*)

The contention urged by appellant that the tangible pawns were separable from the tickets is a frivolous effort on the part of appellant to bolster up an untenable situation. The nature of the business of a pawnbroker is such that the tickets are not and could not be separable from the tangible pawns. Pawnbrokers do not lend money on mere pieces of paper. They lend it on pledges of tangible personal property delivered into their possession under a pledgor's lien as security for repayment of the debt. The pawn ticket is merely the identification of the tangible pawn and evidence of the amount of the debt which must be repaid to redeem it.

To reverse the judgment of the lower court in this matter would be to work an injustice on other creditors of the bankrupt well in excess of one million and a quarter dollars, who have likewise suffered disaster as a result of extending credit to the bankrupts. They, unlike Kleinman, were not "on the inside" and had no means of knowing the true situation existing in Zemansky's business. They will be obliged to take their pro rata dividends under the provisions of §65-a of the Bankruptcy Act. Mr. Kleinman, after exacting 12% interest for his money, now

seeks to place himself in a preferred position with a secured claim with a rate of interest of 10% per annum until paid, by virtue of his alleged security.

To reverse this judgment will place a premium on sharp business practices designed to circumvent the plain provisions of the law, in favor of one who has the inside track in a failing business institution.

On the other hand, to affirm the judgment of the court will do Mr. Kleinman no wrong, either legally or morally. His claim has been allowed as a general unsecured claim against the bankrupt estate and he will share in *pari passu* with the rest of the creditors of the bankrupt, receiving a dividend of an equal per centum, as contemplated by §65-a of the Bankruptcy Act. He is not entitled to receive any more. (See Bankruptcy Act §65-e, 11 U. S. C. A., Sec. 105E.)

Imperial Paper & Color Corporation v. Sampsell,
313 U. S. 215;

Buffum v. Barceloux Co., 289 U. S. 227.

We respectfully submit that the judgment of the District Court and of the Referee should be affirmed.

Dated: January 28, 1943.

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No. 10236.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of ABRAHAM ZEMANSKY, DAVID ZEMANSKY and SOL
ZEMANSKY, doing business under the fictitious name
and style of PROVIDENT LOAN ASSOCIATION and STATE
LOAN OFFICE, BANKRUPTS,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

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Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

In our Appellee's brief we discussed the invalidity of the purported security taken by Appellant in the light of the decision of the Supreme Court of the United States in the case of *Benedict v. Ratner*, 268 U. S. 353.

We now learn that Collier on Bankruptcy, 14th Edition recently out, has devoted several pages to an extensive discussion of the doctrine of *Benedict v. Ratner*, under Section 70-e of the National Bankruptcy Act. That portion of the discussion pertaining to assignment of accounts receivable (or choses in action as the pawn tickets are contended to be here), begins at page 1388, Volume 4.

Under Note 44, at page 1390, is cited a large number of cases wherein the Circuit Courts of Appeal throughout

the United States have followed the *Benedict v. Ratner* decision. We believe that a citation of these cases should be before the court, hence this short supplemental brief. They are:

Markovitz v. Taylor (C.C.A. 3rd Cir.), 94 Fed. (2d) 782, 36 Am. B. R. (N. S.) 1;

Lee v. The State Bank and Trust Co. (C.C.A. 2d Cir.), 38 Fed. (2d) 45, 15 Am. B. R. (N. S.) 317;

Union Trust Co. of Md. v. Peck (C.C.A. 4th Cir.), 16 Fed. (2d) 986, 9 Am. B. R. (N. S.) 127, certiorari denied 273 U. S. 767;

Blue v. Herkimer Natl. Bank (C.C.A. 2d Cir.), 30 Fed. (2d) 256, 13 Am. B. R. (N. S.) 416;

Matter of Borok (C.C.A. 2d Cir.), 50 Fed. (2d) 75, 18 Am. B. R. (N. S.) 270;

McCluer v. Heim-Overly Realty Co. (C.C.A. 8th Cir.), 71 Fed. (2d) 100, 25 Am. B. R. (N. S.) 656 (distinguishing case on the facts);

The City National Bank of Beaumont v. Zorn (C.C.A. 5th Cir.), 68 Fed. (2d) 566, 24 Am. B. R. (N. S.) 252.

Supplementing our citations of authority in Appellee's brief at page 41 on the question of the hostility of the law toward secret liens and charges on a debtor's property, to the detriment of general creditors, we wish to cite and quote the following extract from the decision of this Court in *Stepp v. McAdams*, 88 Fed. (2d) 925:

"The law frowns upon secret charges against property. It is well established that equitable liens will not be enforced against creditors without notice, either actual or constructive.

In the leading case of *Walker v. Brown*, 165 U. S. 654, 664, 17 S. Ct. 453, 457, 41 L. Ed. 865, Mr. Justice White said: 'It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if such intention arises by a necessary implication from the terms of the agreement, construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third persons who are volunteers *or have notice*.' (Italics ours.) See, also, *Tobin v. Insurance Agency Co.* C.C.A. 8), 80 F. (2d) 241, 243.

The rule in California accords with general law. As to chattel mortgages, which are dealt with in the California Civil Code in the title of 'Liens', §2957 of that compilation provides:

'A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless:

'1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors;

'2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property.'

Expounding the Code provisions relative to unrecorded transfers, mortgages, and liens affecting personal property, when unaccompanied by 'immediate delivery', the Supreme Court of California, in *Ruggles v. Cannedy*, 127 Cal. 290, 297, 53 P. 911,

913, 59 P. 827, 46 L. R. A. 371, said: 'The very object of them all—the reason for their being—is to *prevent secret liens upon and interests in personal property*. Says Chancellor Kent (2 Kent, Comm. 523): 'The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visable owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession * * * It necessarily creates a *secret incumbrance* as to personal property, when to the world the vendor or mortgagor appears to be the owner, *and he gains credit as such*, and is enabled to practice deceit upon mankind.' (Italics ours.) See, also, *Wolpert v. Gipton*, 213 Cal. 474, 481, 2 P. (2d) 767; *Merriman v. Martin*, 113 Cal. App. 167, 175, 298 P. 95, petition for hearing denied by the Supreme Court of California on May 28, 1931; 16 Cal. Juris 340, §39.

We therefore hold that, in the absence of a showing of the recordation of the contract of November 25, 1929, or of actual notice of such contract brought home to the Elmer Company's other creditors, such contract did not create an equitable lien, enforceable as against such other creditors, upon the proceeds from the oil produced by the wells named therein."

Dated: March 12, 1943.

Respectfully submitted,

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